TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 51

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, ET AL., APPELLANTS,

vs.

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK

FILED APRIL 21, 1941.

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., of the Estate of John J. McGlone, deceased, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, Ignatius V. McGlone, Thomas McGlone and Rose McGlone Meredith, Appellants,

Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, Respondent

Statement Under Rule 234

This proceeding was commenced pursuant to Section 145-a of the Surrogate's Court Act upon the petition of Irving Trust Company and Thomas F. McGlone, Jr., as [fol. 2] Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased. Said petition is dated the 26th day of November, 1937. Issue was joined on January 17th, 1938, by the service of the answers of the respondent Helena Day McGlone, Thomas F. McGlone and Rose McGlone Meredith, Ignatius V. McGlone, and George A. Voss, as Special Guardian for Edward McGlone and Robert McGlone, infants.

The names of the petitioners are Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased. The respondent was Helena Day McGlone.

Said Helena Day McGlone died on August 6th, 1939. By an order of this Court dated October 23rd, 1939, Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, was substituted as the respondent in place and stead of said Helena Day McGlone. The other parties to this proceeding are Thomas F. McGlone, Rose McGlone Meredith, Ignatius V. McGlone, Edward McGlone and Robert McGlone, the last two being infants, who previously appeared herein by George A. Voss, as Special Guardian. Said George A. Voss died on September 17th, 1939, and was succeeded by Ralph L. Kaskell, Jr., as Special Guardian herein. That in and by said order of this Court dated October 23rd, 1939, said Ralph L. Kaskell, Jr., as [fol. 3] Special Guardian for said infants, Edward McGlone and Robert McGlone, was substituted for George A. Voss, as Special Guardian for Edward McGlone and Robert McGlone, infants, as one of the appellants herein.

The name and address of the petitioners' attorneys are Orr & Brennan, Esqs., 16 Court Street, Borough of Brooklyn, City of New York, who also represent Thomas F. McGlone and Rose McGlone Meredith. The name and address of the respondent's attorney is Andrew F. Van Thun, Jr., 189 Montague Street, Borough of Brooklyn, City of New York. The office and post office address of Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, is 161-19 Jamaica Avenue, Jamaica, New York. The attorney for Ignatius V. McGlone was said George A. Voss, whose address was 2 Rector Street, Borough of Manhattan, City of New York. No attorney has been substituted for said George A. Voss as attorney for said Ignatius V. McGlone. Said Ignatius V. McGlone resides at 88-10 239th Street, Bellerose, L. I.

Except as aforesaid, there has been no change in the parties or attorneys herein since the commencement of this proceeding.

[fol. 4] In Surrogate's Court, Kings County

In The Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the

Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

NOTICE OF APPEAL BY IRVING TRUST CO. AND THOMAS F. McGLONE, JR., AS EXECUTORS, ETC., THOMAS F. McGLONE AND ROSE McGLONE MEREDITH.

SIRS:

Please Take Notice, that Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and Thomas F. McGlone and Rose McGlone Meredith hereby appeal to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of the decree of Honorable George Albert Wingate, Surrogate, entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, as denies the prayer of the petitioners as contained in the petition herein and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. Mc-[fol. 5] Glone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding.

Dated, Brooklyn, N. Y., July 18th, 1939.

Yours, etc.,

Orr & Brennan, Attorneys for Petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and

for Thomas F. McGlone and Rose McGlone Meredith, Office and P. O. Address, 16 Court Street, Brooklyn, N. Y.

[fol. 6] To: Andrew F. Van Thun, Jr., Esq., Attorney for Respondent, Helena Day McGlone, Office and P. O. Address, 189 Montague Street, Brooklyn, N. Y.; George A. Voss, Esq., Special Guardian for Edward McGlone and Robert McGlone, infants, and attorney for Ignatius V. McGlone, Office and P. O. Address, 2 Rector Street, New York, N. Y.; Percy T. Stapleton, Esq., Clerk of Surrogate's Court, Kings County.

In Surrogate's Court, Kings County

Notice of Appeal by Ignatius V. McGlone

Sirs:

Please Take Notice, that Ignatius V. McGlone hereby appeals to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of the decree of Honorable George Albert Wingate, Surrogate, entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, as denies the prayer of the petitioners Irving Trust Company and Thomas F. Mc-[fol. 7] Glone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, as contained in the petition herein, and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George

A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding.

Dated, New York, July 20th, 1939.

Yours, etc.,

George A. Voss, Attorney for Ignatius V. McGlone, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City, N. Y.

[fol. 8] To: Orr & Brennan, Esqs., Attorneys for Petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and for Thomas F. McGlone and Rose McGlone Meredith, Appellants, Office & P. O. Address, 16 Court Street, Brooklyn, New York; Andrew F. Van Thun, Jr., Esq., Attorney for Respondent, Helena Day McGlone, Office and P. O. Address, 189 Montague Street, Brooklyn, N. Y.; Percy T. Stapleton, Esq., Clerk of Surrogate's Court, Kings County.

[fol. 9] In Surrogate's Court, Kings County

Notice of Appeal by Special Guardian for Edward McGlone and Robert McGlone, Infants

Sirs:

Please Take Notice, that Edward McGlone and Robert McGlone, infants over the age of fourteen years, by George A. Voss, their Special Guardian, hereby appeal to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of the decree of Honorable George Albert Wingate, Surrogate, entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, as denies the prayer of the petitioners Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, as contained in the petition herein, and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said de-

cedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special [fol. 10] Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding.

Dated, New York, July 20th, 1939.

Yours, etc.,

George A. Voss, Special Guardian for Edward McGlone and Robert McGlone, infants over the age of fourteen years, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City, N. Y.

To: Orr & Brennan, Esqs., Attorneys for Petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, and for Thomas F. McGlone and Rose McGlone Meredith, Appellants, Office & P. O. Address, 16 Court Street, Brooklyn, New York; Andrew F. Van Tiun, Jr., Esq., Attorney for Respondent, Helena Day McGlone, Office and P. O. Address, 189 Montague Street, Brooklyn, N. Y.; Percy T. Stapleton, Esq., Clerk of Surrogate's Court, Kings County.

[fol. 11] In Surrogate's Court, Kings County

Present: Hon. George Albert Wingate, Surrogate

Decree Appealed From—June 27, 1939

The above named Irving Trust Company and Thomas F. McGlone, Jr., having on or about the 26th day of November, 1937, presented their verified petition to this court, praying

for a decree determining that Helena Day McGlone, surviving spouse of the above named decedent, is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law and determining that she voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said decedent and that such agreement, renunciation, release and waiver is in full force and effect and determining that she has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph "Third" of the last Will and Testament of said decedent; and a citation having been thereupon issued out of this court directed to Helena Day McGlone, Rose McGlone Meredith, Thomas F. McGlone, Ignatius V. McGlone, Edward McGlone, Robert McGlone and Thomas F. McGlone, Jr., requiring them and each of them to show cause at the Surrogate's Court, Kings County, to be held on the 17th day of January, 1938, why such determination [fol. 12] should not be made, and said citation having been returned with proof of due service thereof upon all of the parties named; and the said petitioners having duly appeared on the return day of the citation by Orr & Brennan, Esqs., their attorneys, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, and the court having appointed George A. Voss, Esq., special guardian for Edward McGlone and Robert McGlone, infants; and the respondent, Helena Day McGlone, having duly filed her answer to the petition herein and having by stipulation, dated September 14, 1938, amended paragraph "Two" in her answer, and Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their special guardian, having filed their answer to the petition herein, and Ignatius V. McGlone having filed his answer to the petition herein, by George A. Voss, Esq., his attorney, and Thomas F. McGlone and Rose McGlone Meredith having filed their answer to the petition herein by Orr & Brennan, Esq.; and the matter having come on for hearing and trial on the 25th day of May, 1939, and the petitioners having appeared by their attorneys, Orr & Brennan, Esqs., in support of said petition, and Thomas F. McGlone and Rose McGlone Meredith, having appeared by their attorneys, Orr & Brennan, Esqs., and Edward McGlone and Robert McGlone, infants, having appeared by George A. Voss, Esq., their special guardian, and Ignatius

V. McGlone, having appeared by George A. Voss, Esq., his attorney, also in support of said petition, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., in opposition to the relief in said petition requested, and after hearing the proofs and allegations [fol. 13] of the parties, and after due deliberation having been had thereon, and a decision in writing having been filed by the Surrogate:

Now, on motion of Andrew F. Van Thun, Jr., Esq., attorney for respondent, Helena Day McGlone, surviving spouse of said decedent, it is

Ordered, adjudged and decreed that the prayer of the petitioners, as contained in the petition be and the same is in all respects denied; and it is further

Ordered, adjudged and decreed that Helena Day McGlone, surviving spouse of the said John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day of September, 1937, is a valid and effective exercise of such election; and it is further

Ordered, adjudged and decreed that the said Helena Day McGlone is entitled to one-half of the net estate of the said deceased after the deduction of debts, funeral and administration expenses and any estate tax; and it is further

Ordered, adjudged and decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to George A. Voss, Esq., special guardian of Edward [fol. 14] McGlone and Robert McGlone, infants, the sum of $2,500.00 hereby allowed him for services as such special guardian in this proceeding.

G. A. W., Surrogate.

In Surrogate's Court, Kings County

Petition

To the Surrogate's Court of the County of Kings:

The petition of Irving Trust Company, a New York corporation, having its principal place of business at #1 Wall

Street, Borough of Manhattan, City and State of New York, and Thomas F. McGlone, Jr., residing at #617 Montgomery Building, City and County of Spartanburg, State of South Carolina, as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, respectfully shows to this Court and alleges:

First. That your petitioner, Irving Trust Company, is one of the Executors named in the Last Will and Testament and Codicil thereto of John J. McGlone, late of the County of Kings, deceased, and your petitioner, Thomas F. McGlone, Jr., is the other Executor named in the Codicil to the Last Will and Testament of John J. McGlone, late of the County of Kings, deceased.

Second. That at the time of his death said John J. McGlone resided at #22 Prospect Park West, in the Borough [fol. 15] of Brooklyn, County of Kings, City and State of New York, and died in the Long Island College Hospital, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 22nd day of February, 1937.

Third. That said deceased left him surviving his widow, Helena Day McGlone, Rose McGlone Meredith, a sister, Thomas F. McGlone, a brother, Ignatius V. McGlone, a brother, Thomas F. McGlone, Jr. (one of the petitioners herein), a nephew of the deceased, and being the son of the decedent's brother, Thomas F. McGlone aforementioned, Edward McGlone and Robert McGlone, nephews of the deceased, and being sons of the decedent's brother, Ignatius V. McGlone aforementioned, the only heirs at law and next of kin of said deceased.

Fourth. That said Last Will and Testament relates to both real and personal property and bears date the 21st day of August, 1930. That said Codicil to said Last Will and Testament relates to both real and personal property and bears date the 6th day of July, 1934. Copies of said Last Will and Testament and Codicil are hereto annexed, marked Exhibit "A" and made part hereof. That said Last Will and Testament and Codicil were duly proved and admitted to probate by and before this Court on April 8th, 1937, and Letters Testamentary thereon were on that date duly issued to your petitioners, the Executors named in said Last Will and Testament and Codicil thereto. That your petitioners have duly qualified thereunder and have since been and still

are acting as such Executors. That said Executors are also named in the Codicil to said Last Will and Testament as the Trustees of the trust thereby created.

[fol. 16] Fifth. That paragraph "Third" of said Last Will and Testament provides as follows:

"My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character."

Sixth. That said John J. McGlone and Helena Day McGlone (then Helena Day Snyder), were married on February 4th, 1922 at Saint Edward's Church, Chiswick, London, England; that there was no issue of said marriage between John J. McGlone and Helena Day McGlone; that this was the third marriage for said Helena Day McGlone. Upon information and belief that she was first married to one Lewis, and her second marriage was to one Snyder. Upon information and belief that there was no issue of any of these marriages.

Seventh. Upon information and belief that at the time of her marriage to said John J. McGlone, said Helena Day McGlone was possessed of a fortune of her own, consisting of real and personal property, from which she was then [fol. 17] receiving an income of upwards of Twelve Thousand ($12,000.00) Dollars per year.

Eighth. Upon information and belief that said Helena Day McGlone is now about seventy-eight (78) years old; that she is possessed of real and personal property, and has ample means of supporting herself.

Ninth. That on or about February 2nd, 1922, in contemplation and in consideration of said marriage between John J. McGlone and Helena Day Snyder, and for other good and

valuable consideration, said Helena Day McGlone (then Helena Day Snyder) executed and delivered to said John J. McGlone a paper writing, photostatic copy of which is hereto annexed, marked Exhibit "B" and made part hereof. That said John J. McGlone and Helena Day Snyder were thereafter and on the 4th day of February, 1922, married as aforesaid. That at the time of the execution and delivery of said instrument said Helena Day Snyder had full knowledge of the nature, terms and effect thereof.

Tenth. That in and by said instrument, said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, waive and release all rights in the estate of said John J. McGlone, deceased.

Eleventh. That such agreement, waiver, release and renunciation is in full force and effect.

Twelfth. That on the 23rd day of September, 1937, said Helena Day McGlone served upon your petitioners herein [fol. 18] a notice of election to take her share of the estate of said John J. McGlone, deceased, as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law, a copy of which notice is hereto annexed, marked Exhibit "C" and made part hereof.

Thirteenth. That the only persons interested in this proceeding are the following:

Helena Day McGlone, widow, who resides at 22 Prospect Park West, Brooklyn, New York.

Rose McGlone Meredith, a sister, who resides at Gainesville, Virginia.

Thomas F. McGlone, a brother, who resides at Spartanburg, South Carolina.

Ignatius V. McGlone, a brother, who resides at 8810 239th Street, Queens Village, New York.

Pastor of Saint Peter's Roman Catholic Church of Harper's Ferry, West Virginia, Harper's Ferry, West Virginia.

Saint Peter's Roman Catholic Cemetery, Harper's Ferry, West Virginia.

Edward McGlone, a nephew, who resides at 8810—239th Street, Queens Village, New York.

Robert McGlone, a nephew, who resides at 8810—239th Street, Queens Village, New York.

Irving Trust Company, one of the Executors named in the Will and Codicil thereto of deceased (one of the peti-

tioners herein), having its principal place of business at #1 Wall Street, New York City, New York.

[fol. 19] Thomas F. McGlone, Jr., a nephew, and the other Executor named in the Codicil to the Will of the deceased (the other petitioner herein), who resides at 617 Montgomery Building, Spartanburg, South Carolina.

Upon information and belief that all the persons above named are of sound mind and full age, except Edward McGlone and Robert McGlone, each of whom is an infant over the age of fourteen years, and have no General or Testamentary Guardian. That it may be proper that some person be appointed as Special Guardian for said infants in this proceeding.

That no previous application for the relief herein sought has been made.

Wherefore, your petitioners pray for a decree:

1. Adjudging, Determining and Decreeing that said Helena Day McGlone is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law.

2. Adjudging, Determining and Decreeing that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect.

3. Adjudging, Determining and Decreeing that said Helena Day McGlone has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the said Last Will and Testament of John J. McGlone, deceased.

[fol. 20] 4. That your petitioners have such other and further relief as to the Court may seem just and proper; and

5. That the persons above named be cited to show cause why the determination herein prayed for should not be made.

Dated: November 26th, 1937.

Irving Trust Company, by George A. Murphy, Assistant Secretary; Thomas F. McGlone, Jr., Petitioners.

(Verified by George A. Murphy, Assistant Secretary of Irving Trust Company, the 26th day of November, 1937.)

(Verified by Thomas F. McGlone, Jr., the 29th day of November, 1937.)

(Certificate of E. W. Miller, Clerk of Spartanburg County, attached to original.)

EXHIBIT "A" ATTACHED TO PETITION

I, John J. McGlone, of the Borough of Brooklyn, County of Kings, City and State of New York, hereby revoking any and all other Wills by me at any time heretofore made, do make, publish and declare the following to be my last Will and Testament.

First. I order and direct my Executors hereinafter named to pay all my just debts and funeral expenses as [fol. 21] soon as may be convenient after my decease.

Second. I direct my Executors to purchase two (2) Five Hundred ($500.00) Dollar bonds, either of the City or State of New York, or of the United States, paying therefor the par value if necessary, and any premium or expenses that may be necessary in making the said purchase, and I give and bequeath Five Hundred ($500.00) Dollars of the said bonds so to be purchased, to the Pastor at the time of my death, and his successors forever, of Saint Peter's Roman Catholic Church of Harper's Ferry, West Virginia, and request that the same be held and the income used for the offering of two (2) Masses annually for the repose of the souls of the family of Edward and Elizabeth McGlone (my father and mother), such Masses to be said in January and July of each year if convenient. Five Hundred ($500.00) Dollars of the said bonds so purchased, I give and bequeath to Saint Peter's Roman Catholic Cemetery, Harper's Ferry, West Virginia, or to the proper officials thereof, in perpetuity, to be held as a trust fund, the income of which is to be applied to keep in good order the plot in the said cemetery in which members of the McGlone family are interred.

J. J. McG.

Third. My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate,

I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my [fol. 22] Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character.

Fourth. All the rest, residue and remainder of my estate both real and personal, of whatsoever kind and wheresoever situated, I give, devise and bequeath in equal shares to my sister, Rose McGlone Meredith, of Gainesville, Virginia, and my two brothers, Thomas F. McGlone, of Spartanburg, South Carolina, and Ignatius V. McGlone, of 220-22 Davenport Avenue, Queens Village, Long Island, New York, and in the event of the death of either of my brothers above named leaving issue, I direct that the share which would have been paid over to my said brother be paid to his issue, per stirpes. In the event of the death of my sister, her share in my estate shall be divided equally between my brothers, or in the event of their death to their issue, per stirpes.

Fifth. I hereby nominate, constitute and appoint my brother, Ignatius V. McGlone, and Irving Trust Company of the City of New York, Executors of this my last Will and Testament, and I direct that they act as such without being required to give bond conditioned for the faithful performance of their duties.

J. J. McG.

In Witness Whereof, I have hereunto set my hand and seal this 21st day of August, in the year one thousand nine hundred and thirty.

John J. McGlone, (L. S.)

In the presence of: Witness: T. Genevieve Donlon. Witness: William H. Orr.

[fol. 23] The foregoing was Signed, Sealed, Published and Declared by the within named Testator, John J. McGlone, as and for his last Will and Testament in the presence of each of us, who, at his request, in his presence and in the presence of each other, did thereupon subscribe our names at the end thereof as witnesses thereto.

Witness: 1. Genevieve Donlon. Residing at: 8317 Colonial Road, Bklyn, N. Y. Witness: William H. Orr. Residing at: 615 Tremont Ave., Westfield, N. J.

I, John J. McGlone, of the Borough of Brooklyn, County of Kings, City and State of New York, having made my Last Will and Testament on August 21st, in the year one thousand nine hundred and thirty, do now make, publish and declare the following to be a Codicil to my said Last Will and Testament.

First. I hereby direct that the one-third of the residue of my estate payable to my brother, Ignatius V. McGlone, of Queens Village, Long Island, New York, under the terms of paragraph "Fourth" of my said Last Will and Testament, be given to my nephew, Thomas F. McGlone, Jr., and Irving Trust Company, in Trust, Nevertheless, to and for the following uses and purposes:

To receive, hold, invest and reinvest the same and to pay over the net income accruing from the same quarterly to my said brother, Ignatius V. McGlone, as long as he shall [fol. 24] live, and upon his death to divide the said one-third of my residuary estate into two equal parts, one part, being one-sixth of my residuary estate to continue to be held in trust by the said Thomas F. McGlone, Jr., and Irving Trust Company, for the benefit of my nephew, Edward McGlone, the income being paid over to him quarterly until he reaches the age of thirty-five (35) years, at which time the principal of said trust shall be paid over to him. The other one-half of the trust fund created for the benefit of my brother, Ignatius V. McGlone, being one-sixth of my residuary estate, shall continue to be held in trust by Thomas F. McGlone, Jr., and Irving Trust Company for the benefit of my nephew, Robert McGlone, the income being paid over to him quarterly until he reaches the age of thirty-five (35) years, at which time the principal of said trust shall be paid over to him.

J. J. McG.

In the event that either of my said nephews, Edward McGlone or Robert McGlone, should have reached the age of thirty-five (35) years before the death of my brother, Ignatius V. McGlone, then upon the latter's death, one-half of the trust fund set aside for his benefit shall be paid over to the nephew who shall have reached the age of thirty-five (35) years.

In the event that either of my said nephews, Edward McGlone or Robert McGlone, should die before reaching the age of thirty-five (35) years, leaving issue surviving, such issue shall take their parent's share, but if there be no issue, such share shall be added to the trust fund created for the benefit of the nephew who survives, and the principal thereof be paid over to him when he reaches the age of thirty-five (35) years.

[fols. 25-26] Second. I hereby revoke the appointment of my brother, Ignatius V. McGlone, as co-executor with the Irving Trust Company, of my last Will and Testament, and substitute my nephew, Thomas F. McGlone, Jr., of Spartanburg, South Carolina, in his place, so that I appoint Irving Trust Company and Thomas F. McGlone, Jr., Executors and Trustees of my said Last Will and Testament, and I direct that they act as such without being required to give bond conditioned for the faithful performance of their duties.

In all other respects, I hereby ratify and confirm my said Last Will and Testament, dated August 21st, 1930.

In Witness Whereof, I have hereunto set my hand seal this 6th day of July, in the year one thousand nine hundred and thirty-four.

John J. McGlone (L. S.)

In the presence of: Witness: Elizabeth C. Mell. Witness: William H. Orr.

The foregoing was Signed, Sealed, Published and Declared by the within named Testator, John J. McGlone, as and for a Codicil to his last Will and Testament, in the presence of each of us, who, at his request, in his presence and in the presence of each other, did thereupon subscribe our names at the end thereof as witnesses thereto.

Witness: Elizabeth C. Mell. Residing at: 119-20 Union Turnpike, Kew Gardens, N. Y. Witness: William H. Orr. Residing at: 615 Tremont Ave., Westfield, N. J.

(Here follow 2 photolithographs, side folios 27-28)

27 = 28

EXHIBIT "B," ATTACHED TO PETITION.

Oke Beverage,
Ostersby, Middlesex, England.
February 2-1922.

SAVOY HOTEL
LONDON
W.C.2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McElwee, in London, England, on February 4th, 1922, make to record of my free will, that as I already possess, in my own right, ample of this world's [illegible] of my own as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might legally or otherwise have in any estate real or personal, of which my said husband, to be, John J. McElwee, might die seized.

Helena Day Snyder

27-28

[fol. 29] In Surrogate's Court, Kings County

Answer of Helena Day McGlone

The respondent, Helena Day McGlone, answering the petition herein, alleges:

One. Denies the allegation of paragraph "Eighth" except that she is about seventy-eight years of age.

Two. Admits the making of the paper writing marked Exhibit B mentioned in paragraph "Ninth" of the petition, and denies each and every other allegation therein contained.

Three. Denies each and every allegation contained in the paragraphs marked "Seventh," "Tenth" and "Eleventh."

Wherefore said respondent, Helena Day McGlone, prays for a decree adjudging, determining and decreeing that the notice of election to take her share of the estate of said John J. McGlone, deceased, as an intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law, heretofore served upon the petitioners as set forth in paragraph "Twelfth" of the petition herein, is valid.

Andrew F. Van Thun, Jr., Attorney for Respondent,
189 Montague Street, Brooklyn, New York.

(Verified by Helena Day McGlone on January 15th, 1938.)

[fol. 30] In Surrogate's Court, Kings County

Stipulation Amending Answer of Helena Day McGlone

The respondent, Helena Day McGlone, by her attorney, Andrew F. Van Thun, Jr., hereby admits for all purposes, that she delivered to John J. McGlone, the decedent above named, the paper writing referred to in paragraph "Ninth" of the petition and marked Exhibit "B," at the time she executed the same; and the said respondent further stipulates that paragraph "Two" of the answer heretofore interposed by her in the above entitled proceedings be deemed amended to read as follows: "Two: Admits the making of the paper writing marked Exhibit 'B' mentioned in paragraph 'Ninth' of the petition and admits the delivery of the said paper writing marked Exhibit 'B' by her to said John

J. McGlone, and denies each and every other allegation therein contained."

Dated, Brooklyn, N. Y., September 14th, 1938.

Andrew F. Van Thun, Jr., Attorney for Respondent, Helena Day McGlone.

[fol. 31] In Surrogate's Court, Kings County

Answer of Ignatius V. McGlone

Ignatius V. McGlone, by George A. Voss, his attorney, for an answer to the petition herein, alleges as follows:

First. He repeats and realleges each and every allegation contained in the petition with the same force and effect as if the same were here again set forth and repeated at length and hereby consents to the entry of a decree as prayed for in said petition.

George A. Voss, Attorney for Ignatius V. McGlone, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

(Verified by Ignatius V. McGlone on January 22nd, 1938.)

[fol. 32] In Surrogate's Court, Kings County

Answer of Edward McGlone and Robert McGlone, Infants, by Special Guardian

Edward McGlone and Robert McGlone, infants over the age of fourteen years, by George A. Voss, their Special Guardian, for an answer to the petition herein, allege as follows:

First. They repeat and reallege each and every allegation contained in the petition with the same force and effect as if the same were here again set forth and repeated at length and hereby consent to the entry of a decree as prayed for in said petition.

George A. Voss, Special Guardian for Edward McGlone and Robert McGlone, infants over fourteen years of age, Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

(Verified by George A. Voss on January 22nd, 1938.)

[fol. 33] In Surrogate's Court, Kings County

Answer of Thomas F. McGlone, and Rose McGlone Meredith

Thomas F. McGlone and Rose McGlone Meredith, by Orr & Brennan, their attorneys, answering the petition herein:

First. Repeat and reallege each and every allegation contained in said petition with the same force and effect as if the same were here again set forth and repeated at length, and hereby consent to the entry of a decree as prayed for in said petition.

Orr & Brennan, Attorneys for Thomas F. McGlone and Rose McGlone Meredith, Office and P. O. Address, 16 Court Street, Borough of Brooklyn, City of New York.

(Verified by William H. Orr on January 17th, 1938.)

[fol. 34] In Surrogate's Court, Kings County

Statement of Evidence

Before Hon. Geo. A. Wingate, Surrogate

Surrogate's Court,
Brooklyn, New York,
May 25, 1939.

Appearances of Counsel:

Orr & Brennan, Esquires, Attorneys for Petitioners; Philip Zierler, Esquire, and William H. Orr, Esquire, of Counsel; also as attorneys for Thomas F. McGlone and Rose McGlone Meredith.

George A. Voss, Esquire, Special Guardian for Edward McGlone and Robert McGlone and Attorney for Ignatius V. McGlone, Beneficiary under the trust fund.

Andrew F. Van Thun, Jr., Esquire, Attorney for Helena Day McGlone, Respondent; George H. Burtis, Esquire, of Counsel.

Offers in Evidence

Mr. Zierler: I offer in evidence stipulation dated September 14, 1938, amending the answer of Helena Day McGlone.

Mr. Van Thun: No objection.

(Received in evidence and marked Petitioners' Exhibit 1 —May 25, 1939.)

Mr. Zierler: I offer in evidence the paper writing referred to in Paragraph Ninth of the petition and marked Exhibit "B."

Mr. Van Thun: No objection.

(Received in evidence and marked Petitioners' Exhibit 2 —May 25, 1939.)

[fol. 35] Mr. Zierler: And I offer in evidence the marriage certificate of Mr. and Mrs. McGlone.

Mr. Van Thun: No objection.

(Received in evidence and marked Petitioners' Exhibit 3—May 25, 1939.)

Mr. Zierler: The petitioners rest.

Mr. Van Thun: The respondent will rest, your Honor, except I would like to make this statement for the record, that in one of your Honor's opinions in this matter you stated that this document, Exhibit "B"—Exhibit 2, was holographic. It was not a holographic document. The signature of Helena Day——

The Surrogate: Wait a minute, wait a minute. He isn't talking about —oh, 2.

Mr. Van Thun: The signature of Helena Day Snyder is the only part of the document in the handwriting of Helena Day Snyder, now Helena Day McGlone.

The Surrogate: Is that statement accepted as proof of the fact?

Mr. Zierler: Yes, it is. We do not contend that is a holographic document.

The Surrogate: All right.

Mr. Zierler: Does your Honor want a set of the pleadings, marked pleadings?

The Surrogate: I think I will read them.

Mr. Zierler: May we have ten days, both sides, to submit briefs?

The Surrogate: Say June 5th?

Mr. Zierler: Thank you.

Mr. Van Thun: Thank you.

(Discussion off the record.)

Motions for Judgment

Mr. Van Thun: If your Honor please, may it be considered that both sides make a motion for judgment and decree?

The Surrogate: Yes, sir. All right.

[fol. 36] Brooklyn, New York, July 28, 1939.

I hereby certify that the foregoing record of the testimony taken in the matter of the Estate of John J. McGlone, deceased, is a true and correct transcript of the stenographic notes taken by me therein and of the whole thereof.

Gertrude A. Lynch, Official Reporter, Kings County Surrogate's Court.

Petitioner's Exhibit 1

(Stipulation dated September 14, 1938, Amending Answer of Helena Day McGlone, printed at page 30.)

Petitioner's Exhibit 2

(Same as Exhibit "B" Attached to Petition, printed at page 27.)

(Here follows 1 photolithograph, side folios 37-38)

CERTIFIED COPY OF AN ENTRY OF MARRIAGE

(6 & 7 WM. IV., CAP. 86).

GIVEN AT THE GE

Sec. 37 of the above Act enacts that "for every *general search* of the Indexes shall be paid the sum of *twenty shillings*, and "for every *particular search* the sum of *one shilling*, and for every Certified Copy the sum of *two shillings and sixpence*;" exclusive of Inland Revenue Stamp (54 & 55 Vict., c. 39) of *one penny*. Where the application is made by post and the search is conducted by the staff of the General Register Office, the *particular search* fee is *two shillings and sixpence*.

Applicati

REGISTRATION DISTRICT BRENTFORD

1922. Marriage solemnized at Our Lady of Grace High Road Chiswick in the District of Brentford

No.	When Married. (1)	Name and Surname. (2)	Age. (3)	Condition. (4)	Rank or Profession. (5)	Residence at the time of Marriage. (6)
114	Fourth February 1922	John Joseph McGlone	47 years	Bachelor	Vice President International Mercantile Marine Co. American Line.	Savoy Hotel London
		Helena Day Snyder	45 years	Widow	———	The Beverleys Thornbury Road Isleworth

Married in the Our Lady of Grace according to the Rites and Ceremonies of the Roman Catholics

This Marriage was solemnized between us, J.J.McGlone, Helena Day Snyder in the Presence of us, Walter Day, Linda Béroud

CERTIFIED to be a true Copy of an Entry in the Certified Copy of a Register of Marriages in the District above mentioned. Given at the GENERAL REGISTER OFFICE, SOMERSET HOUSE, LONDON, under the Seal of the said Office, the 26th day of

M 19932

This Certificate is issued in pursuance of and subject to the following Acts:—6 & 7 Will. IV., c. 86, sec 38; 24 & 25 Vict., c. 98, sec. 36; The Acts 6 & 7 Will. IV., c. 86, sec. 38, enacts "That all Certified Copies of Entries, purporting to be Sealed or Stamped with the Seal of the Ge Death or Marriage to which the same relates, without any further or other proof of such Entry; and no Certified Copy purporting to be given in or Stamped as aforesaid."

Any person who (1) falsifies any of the particulars on this Certificate, or (2) uses a falsified certificate as true, knowing it to be false, is liabl

(5,827) W.L17288/71 20,000 8/28 Hw. G.9889 4043

F AN ENTRY OF MARRIAGE

WM. IV., CAP. 86).

"for every *general search* of the Indexes shall be paid the sum of *twenty shillings*, and [illegible] *one shilling*, and for every Certified Copy the sum of *two shillings and sixpence*;" [illegible] 55 Vict., c. 39) of *one penny*. Where the application is made by post and the search Register Office, the *particular search* fee is *two shillings and sixpence*.

GIVEN AT THE GENERAL REGISTER OFFICE,
SOMERSET HOUSE, LONDON.

Application Number 15074

REGISTRATION DISTRICT BRENTFORD

[illegible]olemnized at Our Lady of Grace High Road Chiswick in the District of Brentford in the County of Middlesex

Name and Surname. (3)	Age. (5)	Condition. (4)	Rank or Profession. (6)	Residence at the time of Marriage. (7)	Father's Name and Surname. (7)	Rank or Profession of Father. (8)
[illegible]n Joseph McGlone	47 years	Bachelor	Vice President International Mercantile Marine Co. American Line.	Savoy Hotel London	Edward McGlone (deceased)	Independent Means
[illegible]lena Day Snyder	45 years	Widow	———	The Beverleys Thornbury Road Isleworth	James Alexander Day (deceased)	Captain Army M.N.I.

[illegible]dy of Grace according to the Rites and Ceremonies of the Roman Catholics by Licence by me,

[illegible]oGlone
[illegible]a Day Snyder
} in the Presence of us, { Walter Day, Linda Béroud

Edmund F. Egan Canon
W.J. Gardener Registrar

true Copy of an Entry in the Certified Copy of a Register of Marriages in the District above mentioned.

[illegible]L REGISTER OFFICE, SOMERSET HOUSE, LONDON, under the Seal of the said Office, the 26th day of May 1938

This Certificate is issued in pursuance of and subject to the following Acts:—6 & 7 Will. IV., c. 86, sec 38; 24 & 25 Vict., c. 98, sec. 36; 3 & 4 Geo. V., c. 27, sec. 3, 5 & 6.

The Acts 6 & 7 Will. IV., c. 86, sec. 38, enacts "That all Certified Copies of Entries, purporting to be Sealed or Stamped with the Seal of the General Register Office, shall be received as evidence of the Birth, Death or Marriage to which the same relates, without any further or other proof of such Entry; and no Certified Copy purporting to be given in the said Office shall be of any force or effect which is not Sealed or Stamped as aforesaid."

Any person who (1) falsifies any of the particulars on this Certificate, or (2) uses a falsified certificate as true, knowing it to be false, is liable to Prosecution.

ONE PENNY

EXHIBIT 3
SURROGATES COURT
[illegible] COUNTY

37-38

[fol. 39] In Surrogate's Court, Kings County

Opinion

By Mr. Surrogate Wingate.

Matter of Irving Trust Co., &c. (John J. McGlone, dec'd; File No. 1714, 1937)—In view of the earnest and repeated efforts of the petitioners to defeat the present widow's right of election without a hearing on the merits (Matter of McGlone, 166 Misc., 636; 169 id., 498, aff'd 256 App. Div., 1074), the actual trial of the issues appeared as something of an anti-climax.

No testimony was introduced, the composite showing being the introduction into evidence of three documents, namely, first, a stipulation amending the answer of the widow so as to admit her subscription and delivery of the paper upon which her opponents rely to defeat her rights; second, the paper itself; and third, a certified copy of the marriage certificate of the parties, showing the consummation of their marriage on February 4, 1922. Finally, a stipulation was entered on the record that the asserted renunciation or waiver by the present widow of rights in the estate of her husband was not in her handwriting but in that of some other unidentified individual and that the only portion thereof which was written by her was the signature.

It follows, both sides having rested, that the issue raised by the executors to the effect that the widow is precluded from exercising her asserted right of election must be determined on this meagre demonstration and on the showing of the record, consisting preponderantly of the allegations of the petition in so far as they are not denied.

In view of the denials of paragraphs seventh to eleventh of the petition except for the admission in paragraph two [fol. 40] of the answer that the widow signed and delivered to the decedent the alleged waiver, and the failure to introduce any evidence in support of the allegations therein made, they must, except for the noted admissions, be excluded from consideration in the evaluation of the composite situation.

As thus reduced to lowest terms, the record demonstrates that the parties validly intermarried on February 4, 1922. Two days prior to the solemnization of the nuptials, the present widow signed and turned over to the decedent a

document which had not been prepared by her, and "knowledge of the nature, terms and effect" of which she denies. This document reads as follows:

"I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized. Helena Day Snyder."

The decedent died a resident of this county on February 22, 1937, survived by the widow, a sister, two brothers and three nephews, sons of deceased brothers, as his only statutory distributees. His estate, as valued in the estate tax proceedings, of which this court may take judicial notice (Matter of Surpless, 143 Misc., 48, 50; Matter of Morningstar, 143 Misc., 620, 623; Matter of Blake, 146 Misc., [fol. 41] 780, 781-782; Matter of Goldowitz, 153 Misc., 182, 184; Matter of Greenberg, 158 Misc., 446, 448; Matter of Reilly, 165 Misc., 214, 218; Matter of Grube, 7 N. Y. S., 2d, 794, 798, not otherwise reported) amounted to $236,852.74.

His will was executed on August 21, 1930, and a codicil thereto was dated on July 6, 1934. Both were admitted to probate in this court on April 8, 1937. By reason of the execution of the codicil subsequent to August 31, 1930, the composite testamentary disposition is brought within the purview of section 18 of the Decedent Estate Law (Matter of Greenberg, 141 Misc., 874, 880, 881, aff'd 236 App. Div., 733, aff'd 261 N. Y., 474), with the result, since the valid inception of the marriage is both demonstrated and admitted, that the widow is presumptively entitled (Matter of Green, 155 Misc., 641, 649, aff'd 246 App. Div., 583; Matter of Vogel, 251 App. Div., 741) to receive a testamentary benefit, at least partly in cash and the balance on a life trust, amounting to $118,426.37 (Decedent Estate Law, sec. 83, subdiv. 4; Decedent Estate Law, sec. 18, subdiv. 1a). The testamentary instruments, as probated, gave her a general legacy of $2,000 and no more.

In view of the noted presumption which arises by reason of the demonstration of the valid marriage between the parties, the burden is imposed upon those contending for a contrary result to show some legal reason why the right of election accorded by section 18 of the Decedent Estate Law and asserted by the widow should not be effectuated. By reason of the composite demonstration it is presently immaterial whether this burden is one of proof or merely of going forward.

Since the right of election accorded to a surviving spouse by section 18 is absolute except as expressly conditioned by [fol. 42] the terms, of the section, the burden is imposed upon the petitioners who seek a determination that such right is not possessed by this widow to demonstrate the existence of some exception in the statute which has the effect of depriving her of its benefits. They point for this purpose to subdivision 9 of section 18, which reads: "9. The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

Two matters are notable in the language employed in this section. The first is that the only variety of document which, under its language, is declared effective to bar the elective right of the surviving spouse is one which is "subscribed and duly acknowledged." This requirement is prescribed whether such document be "an instrument" required for waiver of the right to elect against an identified will, or "an agreement" prescribed as prerequisite if all rights of the surviving spouse, in their entirety, are to be relinquished. In other words, this requirement of acknowledgement is expressly stipulated in respect of each of the three varieties of documents contemplated in the section, namely, the "instrument" of waiver against a single identified will, the "agreement" of waiver against any will which [fol. 43] is executed after the effective date of the statute, and the "agreement" of waiver or release executed prior to the effective date of the statute.

According to the terms of the subsection it is only a document of this particular description and presenting this prescribed characteristic which will be effective for the purpose of depriving the surviving spouse of the enlarged statutory rights of participation in the estate of her deceased husband accorded her by section 18. In view of the remedial nature of the legislation effected in this enactment as a whole and the liberal interpretation of its terms in favor of the enlarged rights of the survivor which has continuously been practiced and enjoined (Matter of Byrnes, 260 N. Y., 465, 474; Rubin v. Myrub Realty Co., Inc., 244 App. Div., 541, 544; Matter of Greenberg, 141 Misc., 874, 885-886, aff'd 236 App. Div., 733, aff'd 261 N. Y., 474, 479; Thompson v. Thompson, 163 Misc., 946, 950, aff'd 254 App. Div., 601; Matter of Moore, 165 Misc., 683, 690; Matter of Collins, 156 Misc., 783, 785; Matter of Brown, 153 Misc., 282, 287; Matter of Harris, 150 Misc., 758, 760, 761; Matter of Simeone, 141 Misc., 737, 746), it seems apparent that any document should be subjected to strict scrutiny which is tendered in support of a contention that the relief made available for spouses in general may not be claimed by the particular spouse whose rights are in question.

The present document does not comply with the specification of the statute, which is applicable in this regard, namely, that the rights of a surviving spouse may be foreclosed only by an "agreement" "subscribed and duly acknowledged," since this instrument is not acknowledged. The opponents of the widow contend, however, that if the [fol. 44] statute be interpreted as invalidating this instrument, it must be held to be in contravention of article 1, section 10, paragraph 1, of the United States Constitution, and therefore void. The inhibition thus raised is, of course, that "No state shall * * * pass any * * * law impairing the obligation of contracts."

The question is accordingly presented as to whether this unilateral declaration granting for purposes of argument its validity for any purpose is a contract within the contemplation of the federal constitution.

In Louisiana v. Mayor of New Orleans (109 U. S., 285, 288), and again in Morley v. Lake Shore Railway Co. (146 U. S., 162, 170) the United States Supreme Court said: "The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other,

to do, or not to do, certain acts. Mutual assent to its terms is of its very essence."

To this may be added the statement by the same tribunal in Edwards v. Kearzey (96 U. S., 595, 599-600): "A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done."

It is obvious from these statements that in constitutional issues the concept of a contract is precisely the same as in ordinary litigations. The two indispensable essentials are an agreement or "meeting of the minds" of the contracting parties and a consideration moving to the person against whom enforcement of the asserted agreement is sought. Without these two elements no contract can be demonstrated to exist and no constitutional question may arise.

[fol. 45] "The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition" (Louisiana v. Mayor of New Orleans, 109 U. S., 285, 288).

"No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (Wisconsin & Michigan Railroad v. Powers, 191 U. S., 379, 386).

The document here in question does not purport to constitute a contract or agreement. It is a declaration of purpose and intention by the prospective bride only. Not only is no promise made by her but no consideration is expressed or implied. It is closely analogous to those situations which have repeatedly been litigated and in which the uniform determination has been made that no contract was consummated, in which a state has announced a given policy, later reversed, upon which individuals have sought to predicate contract rights. Respecting such a situation Mr. Justice Holmes, writing for the unanimous court, said in Wisconsin & Michigan Railroad v. Powers (191 U. S., 379, 386) "the presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into ac-

count in determining whether the state has purported to bind itself irrevocably or merely has used words of [fol. 46] prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant."

Here there is no promise—merely a declaration of intention. There is also no consideration either recited or demonstrated. In attempted avoidance of this difficulty the petitioners urge that the decedent married the present widow and that marriage has been held to constitute a valid consideration. Granting both premises, there is no inference on the record that the marriage two days later was viewed by the parties as a consideration for the declaration. It is primary that nothing may be deemed a consideration which is not so considered by both parties (Walton Water Co. v. Village of Walton, 238 N. Y., 46, 51; Beck v. Sheldon, 259 N. Y., 208, 211; Edrington-Minot Corp'n v. Garsson, Inc., 219 App. Div., 65, 67). "The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough * * *. Promis-or and promissee must have dealt with it as the inducement to the promise" (McGovern v. City of New York, 234 N. Y., 377, 389; Walton Water Co. v. Village of Walton, 238 N. Y., 46, 51).

Even had it been demonstrated in the present case that the parties considered the consummation of the marriage to be a consideration for the agreement by the bride-elect, of which there is not the slightest indication, this could not, on the showing of the record, supply the requisite consideration for an agreement by the widow, since it is obvious that the parties had already agreed to intermarry and it is elementary that an agreement to to an act which one is already obligated to perform, or actual performance thereof, does not supply an adequate consideration for a [fol. 47] new agreement by the person in whose favor the obligation already exists (Carpenter v. Taylor, 164 N. Y., 171, 177; O'Meara Co. v. Nat. Park Bank, 239 N. Y., 386, 399; 269 Canal Street Corp'n v. Zurich General Accident & Liability Ins. Co., 226 App. Div., 516, 519, aff'd 252 N. Y., 603; Melnick v. Kukla, 228 App. Div., 321, 324).

It is obvious, therefore, that the document in question, not having been acknowledged, does not comply in this regard with the only variety of instrument which under subdivision 9 of section 18 of the Decedent Estate Law will be effective to bar the widow's right of election.

The infirmity of the document does not, however, terminate here. The subdivision expressly prescribes the particular variety of instrument which is requisite for a waiver of the rights of election of a surviving spouse against all wills or in situations in which it was executed prior to the effective date of the statute. In both such connections such instrument must be "an agreement." This term is a word of art possessing a well defined and thoroughly established meaning in the law not only of this state but of every other common-law jurisdiction.

An "agreement" is a mutual assent (Rohr v. Baker, 13 Ore., 350, 10 Pac., 627; Jones v. Williams, 139 Mo., 1, 40 S. W., 353, 367; Richardson v. Clements, 89 Penn St., 503, 505; United States v. Richards, 149 Fed. 443, 451; Carter v. Prairie Oil & Gas Co., 58 Okl., 365, 160 Pac., 319, 322; Dixie Fire Ins. Co. v. Wallace, 153 Ky., 677, 156 S. W., 140, 141; Williams v. Diesel, 65 Okl., 163, 165 Pac., 187, 188) or coming together in accord or meeting of the minds (Leonard v. Marshall, 82 Fed. 396, 399; United States v. [fol. 48] Richards, 149 Fed., 443, 451; Southern Surety Co. v. Phillips, 181 Ark., 14, 24 S. W., 2d, 870, 872), of two or more parties (Jones v. Williams, 139 Mo., 1, 40 S. W., 353, 367; Arnold v. Scharbauer, 116 Fed., 492, 497; Richardson v. Clements, 89 Penn. St., 503, 505; Carter v. Prairie Oil & Gas Co., 58 Okl., 365, 160 Pac., 319, 322; Tucker v. Pete Sheeran Bro. & Co., 155 Ky., 670, 160 S. W., 176, 178; Williams v. Diesel, 65 Okl., 163, 165 Pac., 187, 188; Southern Surety Co. v. Phillips, 181 Ark., 14, 24 S. W., 2d, 870, 872), on a consideration (Arnold v. Scharbauer, 116 Fed., 492, 497). The term connotes a mutual obligation (Benedict v. Pincus, 191 N. Y., 377, 383, 384; Moran v. Standard Oil Co., 211 N. Y., 187, 197; Davis v. Frank, 102 Misc., 683, 684), and is synonymous with the word "contract" (Durham v. Taylor, 29 Ga., 166, 176; Sage v. Wilcox, 6 Conn., 81, 84; Barnard v. Lancashire Ins. Co., 101 Fed., 36, 37; United States v. Edgar, 45 Fed., 44, 46; Michael v. Kennedy, 166 Mo. App., 462, 148 S. W., 983, 984; Douglass v. Williams Art Co., 143 Ga., 846, 85 S. E., 993; Moss v. Winston, 218 Ala., 364, 118 So., 739, 740). As is said in Bingham v. Insurance Co. of North America (74 Wis., 498, 43 N. W., 494, 495): "To constitute an agreement, the minds of both parties must meet. That means * * * that one can not make an agreement alone; that both must understand the agreement alike, and must assent to that

agreement; or, to use the term the law uses in such a case, the minds of the parties must meet upon the subject of the agreement" (see also White v. Allen Kingston Motor Car Co., 69 Misc., 627, 628). Mutual assent and obligation are inherent in the legal conception of an agreement, wherefore purely unilateral action as in the giving of a quitclaim can never constitute an "agreement" (Chamberlain v. Abrams, 36 Wash., 587, 79 Pac., 204, 205).

[fol. 49] The present document does not purport to be even so much as a quitclaim. It is merely a unilateral statement of intention and is accordingly not an "agreement" within the well established connotation of the term.

Those seeking to profit at the expense of the widow contend, however, that when the Legislature twice employed this word of definite legal meaning it did not intend to use it in the sense in which it is habitually employed and designed merely to require a unilateral waiver. As authority for this position they tender Matter of Moore (165 Misc., 683). The court is familiar with this decision and, despite its high regard for its distinguished author, has already expressed its inability to concur in his view (Matter of Shapiro, 154 Misc., 55, 58).

That a waiver of the right to elect against a single identified will may be accomplished by a unilateral instrument is unquestionable because the Legislature has expressly so provided. In respect of a waiver against any will made either before or after the effective date of the statute, the Legislature has pointedly and with reiteration adopted a diverse provision phrased in language possessing a well established legal connotation, and this court does not feel itself justified in holding that these expressly and, to its mind, deliberately chosen, diverse requirements are capable of being accorded a meaning identical with that aptly but differently described in respect of waiver of the right to elect against the provisions of an identified will.

As has hereinbefore been indicated the word "agreement" possesses a well defined meaning in the law, and it is an established principle of statutory construction that [fol. 50] in such a situation its technical connotation must be accorded to it in the absence of unmistakable demonstration of a contrary intention (Perkins v. Smith, 116 N. Y., 441, 448; People, &c., v. Wainwright, 237 N. Y., 407, 412; People ex rel. Hunt v. Lane, 132 App. Div., 406, 407-408 aff'd 196 N. Y., 520), which is here absent.

In the opinion of the court, therefore, the document tendered for the purpose of defeating the elective rights of the widow is defective and invalid for that purpose, both by reason of the fact that it is not acknowledged and because it is not the type of document, namely "an agreement," which has been prescribed by the Legislature for the purpose.

In view of its inadequacy under the provisions of subdivision 9 of section 18 of the Decedent Estate Law and the fact that it does not constitute an enforcible contract or agreement at common law inhibiting the assertion of elective rights, its efficacy, if any, for the purpose of disinheriting the widow must be predicated upon the equitable doctrines of waiver or estoppel.

To establish waiver, it must be shown that there was a deliberate, informed abandonment of known rights (Alsens American Portland Cement Works v. Degnon Contracting Co., 222 N. Y., 34, 37; Draper v. Oswego County Fire Relief Ass'n, 190 N. Y., 12, 16; Ansorge v. Belfer, 248 N. Y., 145, 150; Matter of Feldhus, 165 Misc., 122, 123, aff'd 254 App. Div., 903, aff'd 280 N. Y., 568, 20 N. E., 2d, 17; Matter of Heim, 166 Misc., 931, 937, aff'd 255 App. Div., 1007; Matter of Miller, 162 Misc., 563, 571, aff'd 252 App. Div., 872). Here there is no such demonstration. On the contrary no evidence has been introduced in support of the [fol. 51] allegation, expressly denied by the widow, that at the time of its signature she had "knowledge of the nature, terms and effect" of the document. The petitioner has, therefore, failed to demonstrate a situation to which the equitable doctrine of waiver is applicable.

To constitute an estoppel against her, it must have been demonstrated that the testator altered his position in reliance on the document (Lawrence v. Brown, 5 N. Y., 394, 401; Jewett v. Miller, 10 N. Y., 402, 409; Mfrs. & Traders Bank v. Hazard, 30 N. Y., 226, 230; Continental Nat. Bank v. Nat. Bank of Commonwealth, 50 N. Y., 575, 581; Blair v. Wait, 69 N. Y., 113, 116; Rothschild v. Title Guar. & Trust Co., 204 N. Y., 458, 464; Matter of Leverich, 135 Misc., 774, 778, aff'd on opinion of this court 234 App. Div., 625). Of any such situation the record contains not a scintilla of evidence.

The court therefore deems the document submitted in defeasance of the rights of the widow wholly nugatory on grounds entirely different from those upon which its for-

mer decisions denying judgment on the pleadings to the petitioners were predicated (166 Misc., 636; 169 Misc., 498). It bows to the superior authority of the Appellate Division of this department in its determination (Matter of Rogers, 250 App. Div., 26, 28) that in dealings between husband and wife or prospective spouses "there is no presumption of inequality either way from these relations merely," although it must confess to some difficulty in reconciling this position with the statements of the Court of Appeals in such cases as Matter of Smith (95 N. Y., 516, 522), Pierce v. Pierce (71 N. Y., 154, 158), Graham v. Graham (143 N. Y., 573, 580), Marx v. McGlynn (88 N. Y., 357, 371) and Matter of Putnam (257 N. Y., 140, 143). In any event, [fol. 52] this portion of the rule of the case has now become immaterial in view of its further statement: "But when it appears prima facie that the parties have been dealing with each other under circumstances of inequality, then a presumption arises as against the husband especially if the transaction has resulted in detriment to the wife."

Here the prospective wife, on the eve of her marriage, was induced to sign a document, not prepared by her, knowledge of the nature, terms and effect of which she denies, the effect of which is to deprive her, utterly without any intimation or semblance of consideration of rights of inheritance worth $116,426.37. If this demonstration is not a prima facie sufficient indication of inequality and overreaching on the part of the prospective husband to require his estate to come forward with some explanation demonstrating that no advantage was taken by him of the relationship which the Court of Appeals has on at least two occasions held to be one of confidence and justified reliance (Pierce v. Pierce, 71 N. Y., 154, 158; Graham v. Graham, 143 N. Y., 573, 580) it would seem that the effect of subsection 9 of section 18 of the Decedent Estate Law, as interpreted, has made it possible for a designing spouse or prospective spouse to nullify the entire beneficent purpose of the enactment with virtual impunity.

The court can not believe this to be the law. On the contrary, it conceives the correct doctrine to be that "the courts regard with rigid scrutiny an ante-nuptial contract which deprives her (the wife) of any prospective interest in the estate of her intended husband, and especially is this

survives him" (Graham v. Graham, 143 N. Y., 573, 580) [fol. 53] and "that the courts require strict proof of fairness, when called upon to enforce an anti-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust and unreasonably disproportionate to the means of the husband. *The rule undoubtedly is that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement*" (Pierce v. Pierce, 71 N. Y., 154, 158). Italics not in original.

For the reasons stated the court determines that the present widow is entitled to assert and has validly claimed her right of election to take her intestate share in contravention of the terms of the will pursuant to the provisions of section 18 of the Decedent Estate Law.

Enter decree on notice in conformity herewith.

[fol. 54] In Surrogate's Court, Kings County

Stipulation Settling Case

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action, and that the same be settled and ordered to be filed and annexed to the judgment roll herein.

Dated, New York, November —, 1939.

Orr & Brennan, Attorneys for Appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith. Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, Infants, Appellants. Ignatius V. McGlone, Appellant Appearing Pro Se. Andrew F. Van Thun, Jr., Attorney for Respondent Chase L. Day as Executor, etc., of Helena Day McGlone, Deceased.

In Surrogate's Court, Kings County

Order Settling and Filing Case

On the above stipulation the foregoing case on appeal containing all the evidence, is hereby settled and ordered on file.

Dated, New York, November —, 1939.

George A. Wingate, Surrogate, Kings County.

[fol. 55] In Surrogate's Court, Kings County

Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, judgment roll, and case and exceptions as settled, and the whole thereof now on file in the office of the Clerk of the Surrogate's Court, County of Kings, and certification thereof by the Clerk pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, November , 1939.

Orr & Brennan, Attorneys for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, Appellants.

Ignatius V. McGlone, Appellant appearing pro se.

Andrew F. Van Thun, Jr., Attorney for Respondent Chase L. Day as Executor, etc., of Helena Day McGlone, deceased.

[fol. 56] In Surrogate's Court, Kings County

Order Filing Record in Appellate Division

Pursuant to Section 616 of the Civil Practice Act it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department.

Dated, New York, November , 1939.

George A. Wingate, Surrogate, Kings County.

[fol. 57] IN SURROGATE'S COURT, KINGS COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

Please Take Notice that Chase L. Day, as executor under the Last Will and Testament of Helena Day McGlone, deceased, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Second Department, dated and entered in the office of the Clerk of said Appellate Division, Second Department, on the 29th day of January, 1940, reversing the decree of the Surrogate of the County of Kings entered in this proceeding in the office of the Clerk of the Surrogate's Court of Kings County on June 27, 1939, whereby it was adjudged that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the Will and Codicil of said [fol. 58] decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30, 1937, is a valid and effective exercise of such election and further adjudged that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax; and from the decree or order of the Surrogate's Court, Kings County, entered upon said order of reversal of the Appellate Division in the office of the Clerk of the Surrogate's Court, Kings County, on the 15th day of March, 1940; and the said Chase L. Day, as executor under the Last Will and Testament of Helena Day McGlone, deceased, appeals from each and every part of aid order of reversal and said decree entered upon said order of reversal, as well as from the whole thereof.

Dated, March 30th, 1940.

Andrew F. Van Thun, Jr., Attorney for Chase L. Day, as executor, etc. of Helena Day McGlone, deceased, 189 Montague Street, Brooklyn, New York.

To: Percy T. Stapleton, Esq., Clerk of the Surrogate's Court.

[fol. 59] Orr & Brennan, Esqs., Attorneys for petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as executors, etc., of John J. McGlone, deceased, and attorneys for Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants.

Ignatius V. McGlone, appearing pro se.

In Surrogate's Court, Kings County

[Title omitted]

Present: Hon. George Albert Wingate, Surrogate

Order Appealed from—March 15, 1940

The above named Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testa-[fol. 60] ment and Codicil thereto of John J. McGlone, deceased, having petitioned this Court by verified petition dated November 26th, 1937, for a decree adjudging, determining and decreeing that said Helena Day McGlone is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law; adjudging, determining and decreeing that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect; adjudging, determining and decreeing that said Helena Day McGlone has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the said Last Will and Testament of John J. McGlone, deceased, and a citation having thereupon issued out of this Court directed to said Helena Day McGlone, Rose McGlone Meredith, Thomas F. McGlone, Ignatius V. McGlone, Edward McGlone, Robert McGlone and Thomas F. McGlone, Jr., requiring each of them to show cause at the Surrogate's Court, Kings County, on the 17th day of January, 1938, why a decree as prayed for in said petition should not be made, and said citation having been returned with proof of due service thereof upon all of the parties named, and

the said petitioners having duly appeared on the return day of the citation by Orr & Brennan, Esqs., their attorneys, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, and the Court having appointed George A. Voss, Esq., Special [fol. 61] Guardian for Edward McGlone and Robert McGlone, infants, and the respondent, Helena Day McGlone, having duly filed her answer to the petition herein and having by stipulation dated September 14th, 1938, amended said answer, and Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their Special Guardian, having filed their answer to the petition herein, and Ignatius V. McGlone having filed his answer to the petition herein by George A. Voss, Esq., his attorney, and Thomas F. McGlone and Rose McGlone Meredith having filed their answer to the petition herein by Orr & Brennan, Esqs., their attorneys, and the matter having come on for hearing and trial on the 25th day of May, 1939, and the petitioners having appeared by their attorneys, Orr & Brennan, Esqs., in support of said petition, and Thomas F. McGlone and Rose McGlone Meredith having appeared by their attorneys, Orr & Brennan, Esqs., and Edward McGlone and Robert McGlone, infants, having appeared by George A. Voss, Esq., their Special Guardian, and Ignatius V. McGlone having appeared by George A. Voss, Esq., his attorney, also in support of said petition, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, in opposition to the relief prayed for in said petition, and after hearing the proofs and allegations of the parties, and after filing his decision in writing, the Surrogate having by decree dated June 27th, 1939, entered in the office of the Clerk of the Surrogate's Court, Kings County on said 27th day of June, 1939, ordered, adjudged and decreed that the prayer of the petitioners as contained in the petition be denied in all respects, and ordered, adjudged and decreed that Helena Day McGlone, surviving [fol. 62] spouse of the said John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day

of September, 1937, is a valid and effective exercise of such election, and ordered, adjudged and decreed that the said Helena Day McGlone is entitled to one-half of the net estate of said deceased after the deduction of debts, funeral and administration expenses and any estate tax, and ordered, adjudged and decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to George A. Voss, Esq., special guardian of Edward McGlone and Robert McGlone, infants, the sum of $2,500.00 for services as such special guardian in this proceeding, and the said Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, the petitioners, and Thomas F. McGlone and Rose McGlone Meredith, and the above named Ignatius V. McGlone, and the above named Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their Special Guardian, having appealed to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of said decree as denies the prayer of the petitioners as contained in the petition herein and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of elec- [fol. 63] tion to take against the terms of the Will and Codicil of said decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding, and Ralph L. Kaskell, Jr., Esq., having been appointed and substituted as Special Guardian for said Edward McGlone and Robert McGlone, infants, in place and in stead of said George A. Voss, Esq., by order of the Surrogate of Kings County dated October 6th, 1939, and Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, having been substituted

as the respondent herein in place and in stead of Helena Day McGlone, by order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Ralph L. Kaskell, Jr., as Special Guardian for said Edward McGlone and Robert McGlone, infants, having been substituted in place and in stead of said George A. Voss as Special Guardian for Edward McGlone and Robert McGlone, infants, by said order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Appellate Division [fol. 64] of the Supreme Court, Second Judicial Department, having heard this cause argued, and having ordered and adjudged that the said decree of the Surrogate's Court of the County of Kings so appealed from be unanimously reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and that the matter be remitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein, and an order to this effect having been made and entered by the Appellate Division of the Supreme Court, Second Judicial Department, on January 29th, 1940.

Now, on reading and filing a certified copy of said order of the Appellate Division of the Supreme Court, Second Judicial Department, dated January 29th, 1940, and the costs of the appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith having been taxed and adjusted at the sum of $283.63, and the costs of the appellant Ralph L. Kaskell, Jr., as Special Guardian of Edward McGlone and Robert McGlone, infants, having been taxed and adjusted at the sum of $80.20, it is, on motion of Orr & Brennan, attorneys for the appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith,

Ordered, adjudged and decreed, that said order and judgment of the Appellate Division of the Supreme Court of the [fol. 65] State of New York, Second Judicial Department, be and the same are hereby made the order, judgment and decree of this Court, and it is further

Ordered, adjudged and decreed, that said decree of Honorable George Albert Wingate, Surrogate, dated and

entered in the office of the Clerk of the Surrogate's Court, Kings County, on June 27th, 1939, so appealed from, be and the same hereby is reversed, and it is further

Ordered, adjudged and decreed, that said Helena Day McGlone is not and was not entitled to elect to take her share of the estate of said decedent, John J. McGlone, as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law, and it is further

Ordered, adjudged and decreed, that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased, and that such agreement, renunciation, release and waiver is in full force and effect, and it is further

Ordered, adjudged and decreed, that said Helena Day McGlone and Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, had and has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the Last Will and Testament of John J. McGlone, deceased; and it is further

Ordered, adjudged and decreed, that said Irving Trust Company, Thomas F. McGlone, Jr., as Executors under the [fol. 66] Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith recover retain out of the moneys now in the hands of the Executors, as such Executors, the sum of $283.63 as and for their costs on said appeal, and that they pay to Ralph L. Kaskell, Jr., as Special Guardian of Edward McGlone and Robert McGlone, infants, the sum of $80.20 as and for his costs on said appeal, and it is further

Ordered, adjudged and decreed, that Irving Trust Company and Thomas F. McGlone, Jr., as Executors aforesaid, pay to Ralph L. Kaskell, Jr., Esq., Special Guardian of Edward McGlone and Robert McGlone, infants, the sum of $1,000.00, hereby allowed him for services as Special Guardian in this proceeding.

G. A. W., Surrogate.

[fol. 67] IN SUPREME COURT OF NEW YORK

Appellate Division

[Title omitted]

ORDER ON APPEAL FROM SURROGATE'S COURT—January 29, 1940

[fol. 68] The above named Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, the petitioners, and Thomas F. McGlone and Rose McGlone Meredith, and the above named Ignatius V. McGlone, and the above named Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., their Special Guardian, in this proceeding having appealed to the Appellate Division of the Supreme Court from a decree of the Surrogate's Court, of the County of Kings, made on the 27th day of June, 1939, in so far as it denies the application of the petitioners, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, to determine that Helena Day McGlone is not entitled to elect to take her share of the estate of the decedent as in intestacy pursuant to the provisions of Section 18 of the Decedent Estate Law, etc., and the said appeal having been argued by Mr. Philip Zierler, of Counsel for appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., and Thomas F. McGlone and Rose McGlone Meredith, and argued by Mr. Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, appellant in person, and argued by Mr. Andrew F. Van Thun, Jr., of Counsel for respondent, and due deliberation having been had thereon:

It is Ordered and Adjudged that the decree of the Surrogate's Court of the County of Kings so appealed from be and the same hereby is unanimously reversed on the law and the facts, with costs to appellants filing briefs, payable [fol. 69] out of the estate of John J. McGlone, and the matter remitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein.

Enter:

E. L., P. J.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION

Carswell, J.—The executors of the testator petitioned that it be decreed that his widow was not entitled to elect, under section 18, Decedent Estate Law, to take against his will and codicil. Upon the executor's proof, the widow adducing none, the surrogate decreed that the widow had the right so to elect and had effectively exercised it. The executors and certain next of kin of the testator appeal. The widow died after the decree was entered and has been succeeded by her executor. This proceeding, therefore, has become a contest between the brothers, sister and nephews of the husband and three nieces of the widow.

The facts are not in dispute. They are contained in the pleadings, certain stipulations and two documents.

On February 2, 1922, the testator, John J. McGlone, and Mrs. Helena Day Snyder, American citizens, were in London, England. On that day Mrs. Snyder signed a document. She recited in it that she was of sound mind and, as the occasion was the eve of her marriage to McGlone on February 4, 1922, she wished to record of her own free will that she had ample property and a fortune of her own and as a [fol. 70] compliment to her prospective husband and for other good reasons she voluntarily and irrevocably renounced all right, title and interest that she might have, legally or otherwise, to share in any estate of McGlone of which he might die seized. This instrument in script, on a letterhead of the Savoy Hotel, was in the handwriting of an unidentified person. Mrs. Snyder's signature was conceded to be valid.

On February 4, 1922, McGlone and Mrs. Snyder were married. This was his first and her third marital venture. The authenticated record of the marriage discloses that McGlone was forty-seven years of age and an officer of a steamship line, and that Helena Day Snyder was forty-five years of age and a widow. The proof reveals this reference to forty five years was incorrect; that her real age was sixty-two. She had no children by her prior marriages nor by this one.

On August 21, 1930, as a resident of Brooklyn, McGlone made a will in which he recited the execution by his wife of the February 2, 1922, document waiving all claim to any

interest in his estate. He nevertheless provided that $2,000 should be used to purchase a token for her. On July 6, 1934, he executed a codicil which did not disturb the foregoing provision in the will.

On February 22, 1937, McGlone died. His will was admitted to probate on April 8, 1937. The widow executed and filed on September 23, 1937, an instrument purporting to be a notice of election, pursuant to section 18, Decedent Estate Law, to take against the will and codicil.

The first question is whether on the foregoing proof a presumption of constructive fraud arose from the mere re- [fol. 71] lation of the parties at the time the February 2, 1922, instrument was signed; and whether because of such a presumption the executors were obligated to adduce affirmative proof that the parties dealt with each other on terms of equality and fairness and that the act of Mrs. Snyder was voluntary and well understood.

The respondent invokes such a presumption. It concerns elements which are a species of fraud. The general rule is that fraud vitiates all contracts, but that it is not presumed. An exception arises when the relations of the parties to a contract evoke a presumption of constructive fraud, which presumption requires one invoking the contract to prove affirmatively that it was not the product of undue influence, inequality, overreaching, deception or mistake. This presumption is ordinarily applied to the relationship of guardian and ward; trustee and cestui que trust; attorney and client; and physician and patient. It is also applied to other close relationships when it is affirmatively established by proof of circumstances that the parties are not dealing on an equal basis (Cowee v. Cornell, 75 N. Y., 91, 99). The presumption does not arise from the mere relation of parent and child (Cowee v. Cornell, supra, p. 101; Carpenter v. Soule, 88 N. Y. 251, 256; Jones v. Jones, 137 N. Y. 610, 613; Williams v. Whittel, 69 App. Div. 340, 344). Under the rule which stems from the foregoing cases, no presumption arises merely from the equally close relation of husband and wife (La Tourette v. La Tourette, 54 App. Div. 137, 138; Green v. Benham, 57 App. Div. 9, 14; Donlon v. Donlon, 154 App. Div. 212, 216, 217; Matter of Rogers, 250 App. Div. 26, 28, leave to appeal denied, 274 N. Y. 642; 39 C. J. 668, sec. 244). These cases enforce the rule that in such relationships, whether a pre- [fol. 72] sumption of inequality or constructive fraud arises

"is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely" (Cowee v. Cornell, supra, p. 101). "The law does not presume aught" from this type of mere relationship (Williams v. Whittel, supra, p. 344). Judicial utterances, invoked to support a contrary view, are to be found only in cases, otherwise authoritative, where there was affirmative proof of circumstances of inequality which raised a presumption of constructive fraud and shifted to the proponent of the instrument the burden of going forward with proof that it was executed with understanding, without overreaching and free from any vitiating element. It is when a vitiating element, even though slight, appears that such an agreement is subjected to searching scrutiny. The latter type of cases involving the relationship of parent and child (Green v. Roworth, 113 N. Y. 462; Bernard v. Gantz, 140 N. Y. 249) and the relationship of husband and wife (Pierce v. Pierce, 71 N. Y. 154; Graham v. Graham, 143 N. Y. 573; Lamb v. Lamb, 18 App. Div. 250) is not applicable here. When properly read and analyzed they manifest no essential conflict with the cases which control the instant case.

The burden of proving that the instrument of February 2, 1922, was validly executed rested upon the executors (30 C. J., 668, sec. 244; In re Duan's Estate, Dunn v. Dunn, 224 N. W. 38, Iowa). The unchallenged proof that this instrument was genuine was sufficient to establish prima facie that it was binding upon the widow (Pimpinello v. Swift & Co., 253 N. Y. 159, 162; Matter of Stone, 272 N. Y. 121, 124). The executors were not obligated to come forward with [fol. 73] further proof in the absence of proof from the widow indicating that she dealt with her prospective husband under circumstances of inequality, or with lack of understanding of the effect of her act. If such proof, even though slight, had been forthcoming, the burden or duty of going forward to rehabilitate the prima facie binding force of the instrument would then have shifted to the executors. The widow in seeking to repudiate her solemn writing was not aided by or armed with presumption of inequality (La Tourette v. La Tourette, supra) in the absence of some proof casting suspicion upon or tending to vitiate the instrument.

It has long been the practice of courts to enforce antenuptial agreements, whether they related to existing or after

acquired property as such agreements are favored (Johnston v. Spicer, 107 N. Y. 185, 194; Matter of Estate of Young v. Hicks, 92 N. Y. 235; Green v. Benham, supra). The relationship between husband and wife is, of course, sufficiently close and confidential to require but little affirmative proof in order to cast the burden upon one invoking an instrument executed by a spouse to come forward with affirmative proof that it was executed under circumstances of equality and fairness. This proof may take the form of lack of knowledge on the part of the one resisting the instrument; differences in knowledge of the respective parties; differences in mental or bodily strength; or unfairness and the like. The instrument itself may reveal want of fairness and lack of equality. But none of these elements is present here. The widow might have created the presumption she invokes and cast the burden upon the executors of establishing the fairness of the instrument and its inequal- [fol. 74] ity, if she had made proof—no doubt readily available to her if it were the fact—that the recitals in the instrument were untrue, and by reason of such a circumstance the inference might have been drawn that she was not dealing on a plane of equality with McGlone. She proffered no such proof, so that the recital of admissions made by her must be deemed to be true.

This view makes the executors' proof take on added strength because the instrument furnishes evidence or affirmative proof, by these recitals, in the absence of repudiation or challenge of them by the widow, that she dealt with McGlone under circumstances that were free from inequality and unfairness. The document contains internal evidence that she was possessed of an independent fortune and that because thereof she understandingly renounced any interest in her prospective husband's estate. Another circumstance in the record affirmatively points the same way. The marriage record discloses that the marriage took place two days after the instrument was signed. She gave her age as forty-five, when the fact is that she was sixty-two years of age when she married McGlone, who was then forty-seven years of age. This fact, and the further fact that it was her third marriage, give rise to implications that she was not lacking in experience or suffering from inequality. These facts also carry the further implication that the instrument was signed to induce the marriage.

These views respecting burden of proof were stated more briefly on a prior appeal in this case (256 App. Div. 1074) and result from a re-examination of the subject.

The next question concerns whether the form of the instrument of February 2, 1922, complies with section 18, sub- [fol. 75] division 9, of the Decedent Estate Law. It was not executed by both spouses. It was not necessary that it should be so executed. A unilateral agreement is sufficient when it is acted upon by the other spouse (Matter of Moore, 165 Misc. 683). This view is in accord with the law as it existed before the enactment of that section. Under pre-existing statutes a unilateral agreement affecting the marriage relation and rights thereunder, when acted upon, was valid (sec. 53, Dom. Rel. Law; sec. 31, subdiv. 3, Pers. Prop. Law; Wright v. Wright, 54 N. Y. 437; 30 C. J., 628, sec. 185).

It is asserted, however, that this instrument was merely subscribed and not acknowledged, as required by section 18, subdivision 9, Decedent Estate Law. That subdivision reads: "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement *so executed* made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

The last sentence is the one here applicable. The words "so executed" contained therein incorporate by reference the requirement in the preceding sentence that the subscription shall be "duly acknowledged." The instrument therefore of February 2, 1922, does not comply with this requirement.

This necessitates determining whether the above last [fol. 76] sentence is constitutional. If it is invalid the lack of an acknowledgment is not fatal to the instrument. When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (sec. 53, Domestic Relations Law, sec. 31, subdiv. 3, Personal Property Law), which did not require an acknowledgement;

and an antenuptial agreement made in a foreign country is enforcible in this state (Lemye v. Sirker, 226 App. Div. 159, 161; Ross v. Ross, No. 1, 233 App. Div. 626).

This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (Laws of 1929, chap. 229). The subsequent enactment therefore violated the testator's constitutional rights (U. S. Const., art. 1, sec. 10; N. Y. State Const., art. 1, sec. 6). By the former a state is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid (Walker v. Whitehead, 83 U. S. 314; Edwards v. Kearzey, 96 U. S. 595; Tennessee v. Sneed, 96 U. S. 69; Louisiana v. New Orleans, 102 U. S. 203; McCahey v. Virginia 135 U. S. 662; Coolidge v. Long, 282 U. S. 582; Holmes v. Holmes, 4 Barb. 295, 303; Ralph v. Cronk, 266 N. Y. 428; Matter of Goldberg, 275 N. Y. 186, 189).

The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words "so executed." It is universally recognized that a statute may be constitutional in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after [fol. 77] the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary event. "The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether" (People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 54, 60, per Cardozo, J.; People v. Mancuso, 255 N. Y. 463, 472, 473). The deletion of the words "so executed" does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting that was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

This view has the further effect of recognizing that the sentence with the deletion of the words "so executed" becomes declaratory, in substance, of the pre-existing statute law (sec. 53, Dom. Rel. Law; sec. 31, subdiv. 3, Pers. Prop.

Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid.

This leaves one further question—that of consideration. The February 2, 1922, instrument had a valid consideration. The marriage constituted that consideration. It has long been recognized as "among the highest considerations known to the law" (Kramer v. Kramer, 90 App. Div. 176, [fol. 78] 180; De Cicco v. Schweizer, 221 N. Y. 431, 438, 440; Matter of Miller, 77 App. Div. 473; Wright v. Wright, 54 N. Y. 437; American Surety Co. v. Conner, 251 N. Y. 1, 11).

Accordingly, the instrument of February 2, 1922, under the proof herein constituted a complete bar to the right of the widow to elect to take against the will and codicil of the testator.

The decree of the Surrogate's Court of Kings County, in so far as appealed from, should be reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and the matter remitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein.

[fol. 79] STIPULATION WAIVING CERTIFICATION ON APPEAL TO COURT OF APPEALS

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated by the attorneys for the respective parties that the foregoing are true copies of the notice of appeal to the Court of Appeals, the order of reversal herein, the decree appealed from, the opinion of Appellate Division and the record on appeal as filed with the Clerk of the Appellate Division, Second Department, all of which are now on file in the office of the Clerk of the Surrogate's Court and certification thereof by said Clerk is hereby waived.

Dated, New York, April 30, 1940.

Andrew F. Van Thun, Jr., Attorney for Appellant Chase L. Day, as Executor, etc., of Helena Day Mc-

Glone, deceased; Orr & Brennan, Attorneys for Respondents, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith; Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants, Respondents; Ignatius V. McGlone, Respondent appearing pro se.

[fol. 80] In Court of Appeals of New York

In the Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil Thereto of John J. McGlone, deceased, for a Determination of the Right of Helena Day McGlone to Elect under Section 18 of the Decedent Estate Law to Take against the Provisions of said Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased.

Irving Trust Company et al., Respondents; Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased, Appellant.

Appeal by executor from unanimous order of Appellate Division, second department, reversing Surrogate on law and facts. Matter remitted.

Andrew F. Van Thun, Jr., for appellant.

Ralph L. Kaskell, Jr., and Philip Zierler for respondents.

Opinion—December 31, 1940

Lehman, Ch. J.

The widow of John J. McGlone, a resident of Kings county, who died in February, 1937, served notice upon the executors under his last Will and testament that she elected to take her share of the decedent's estate "as in intestacy" pursuant to section 18 of the Decedent Estate Law (Cons. Laws, ch. 13) (added by chapter 229 of the Laws of 1929 and thereafter amended.) The executors, claiming that the widow had waived and renounced all rights in her husband's estate, instituted proceedings pursuant to section 145-a of the Surrogate's Court Act for a determination of the validity and effect of the widow's attempted election. The Sur-

rogate sustained the widow's right to an election. The Appellate Division reversed the decree of the Surrogate and remitted the matter to the Surrogate's Court for the entry of a decree determining that an instrument executed by the widow in February, 1922, constitutes "a complete bar to the right of the widow to elect to take against the will and codicil of the testator".

On February 4, 1922, the decedent, John J. McGlone, and Helena Day Snyder were married in England. In contemplation of that marriage Helena Day Snyder, on February 2, 1922, signed the paper writing which, it has been held, bars her right to take a share in her husband's estate. It reads as follows: "I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized". She was at that time sixty-two years of age.

The decedent provided as follows for his wife in the third paragraph of his will, which he executed on August 21, 1930: "Third. My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character".

[fol. 81] At the time he executed the will, section 18 of the Decedent Estate Law was not yet in effect and a husband was free to bequeath all his property to strangers. His wife would, in such case, have no right to any share in his estate, though she would have a right of dower in his real

property, except as she might have parted with, waived or lost such right of dower.

Thereafter, however, on July 6, 1934, the testator executed a codicil to the will of August 21, 1930. He did not therein make any additional provision for his wife or disturb the provision previously made; but since the term "will" as defined in the statute includes all codicils as well as will (Decedent Estate Law, Sec. 2), his wife, by force of the statute, became entitled upon the execution of the codicil to a right of election to reject the provision made for her in the will and to take her share of the estate "as in intestacy". Then, for the first time, the question became important whether the renunciation by the wife in 1922 of "all her right, title and interest in any estate real or personal" of which her "husband to be, John J. McGlone, might die seized" has the effect of barring her from asserting her statutory right of election created by a later statute.

The same section of the statute which creates, for the benefit of the surviving spouse of a decedent, a right not previously enjoyed, also provides the manner in which that right may be waived. "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement *so executed*, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section." (Decedent Estate Law, Sec. 18, subd. 9). The statute was intended, it is plain, to deny effect to a waiver not executed in accordance with the statute.

The statute requires that the agreement or instrument of waiver shall be "duly acknowledged" as well as subscribed and the instrument of waiver upon which the executors and legatees rely to defeat the right of election claimed by the widow was subscribed but not acknowledged by her. For that reason, as well as on other grounds, the Surrogate found that the instrument was without effect. The reversal by the Appellate Division is based upon its conclusion that in so far as the statute denies effect to an unacknowledged agreement of waiver or renunciation, previously executed which, even without acknowledgment, was valid at the time

it was executed, the statute violates the testator's constitutional rights guaranteed by article 1, section 10, of the Constitution of the United States and by article 1, section 6, of the Constitution of this State, and is, therefore, void. The Appellate Division rejected, for reasons stated in the opinion, the other grounds upon which the Surrogate based his contention that the waiver was ineffective.

We have examined these other grounds and without now deciding whether all of them are without substance we assume that the Appellate Division did not err in rejecting them; but we are constrained to disagree with the conclusion of the Appellate Division that the testator acquired by the instrument, executed in 1922 in contemplation of marriage, contractual rights, protected by the Constitution of the United States, which have been invaded by the new statute. We may assume, without now deciding or even considering such questions further, that the instrument of waiver, though [fol. 82] unilateral in form, evidences "a contract made between persons in contemplation of marriage" within the meaning of section 53 of the Domestic Relations Law (Cons. Laws, ch. 14); that it is executed in manner which satisfies the requirements of section 31 of the Personal Property Law (Cons. Laws, ch. 41); and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law. That brings us to the question: what are those contractual or property rights which it is said are destroyed by the new statute?

Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of the estate of her "husband to be" which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the property of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights. (Matter of Sherman, 153 N. Y. 1; Norris v.

Beyea, 13 N. Y. 273). A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver.

The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights which the decedent in this case acquired by the waiver—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly-created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she would not otherwise have. That does not, however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right.

The order of the Appellate Division should be reversed and the decree of the Surrogate's Court affirmed, with costs in this court and in the Appellate Division to all parties filing briefs payable out of the estate.

Loughran, Finch, Rippey, Sears, Lewis and Conway, JJ., concur. Ordered accordingly.

[fol. 83] In Court of Appeals of New York

In the Matter of the Application of Irving Trust Company & ano., as Exrs. &c., of John J. McGlone, dec'd, for a determination of the right of Helena Day McGlone to elect &c. to take against the provisions of said Last Will &c.

Remittitur—December 31, 1940

Be it remembered, That on the 14th day of October in the year of our Lord one thousand nine hundred and forty—Chase L. Day, as executor &c., of Helena Day McGlone, deceased—the appellant in this cause, came here unto the Court of Appeals, by Andrew F. Van Thun, Jr., his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Irving Trust Company and another, as executors &c., of John J. McGlone, deceased and others &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Orr & Brennan and others, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 84] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Andrew F. Van Thun, Jr., of counsel for the appellant, and by Messrs. Philip Zierler and Ralph L. Kaskell, Jr. of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and decree of Surrogate's Court affirmed with costs in this court and in the Appellate Division to all parties filing briefs payable out of the estate.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court, Kings County there to be proceeded upon according to law. Therefore, it is considered that the said order of Appellate Division be reversed and decree of Surrogate's Court affirmed &c., as aforesaid.

And thereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogate's Court, Kings County before the Surrogate thereof, according to the form of the statute in such case made and provided, to be en-

forced according to law, and which record now remains in the said Surrogate's Court before the Surrogate thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, December 31, 1940

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 85] In Surrogate's Court, Kings County

Present: Hon. George Albert Wingate, Surrogate

In the Matter of the Application of Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased

Judgment on Remittur—January 24, 1941

The above named Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, having petitioned this Court by verified petition dated November 26th, 1937, for a decree adjudging, determining and decreeing that said Helena Day McGlone is not entitled to elect to take her share of the estate of said decedent as in intestacy, pursuant to the provisions of Section 18 of the Decedent Estate Law; adjudging, determining and decreeing that said Helena Day McGlone voluntarily and irrevocably agreed to and did renounce, release and waive all rights in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect; adjudging, determining and decreeing that said Helena Day McGlone has no interest or share in

the estate of said John J. McGlone, deceased, except as provided in paragraph marked "Third" of the said Last Will and Testament of John J. McGlone, deceased, and a citation having thereupon issued out of this Court directed to [fol. 86] said Helena Day McGlone, Rose McGlone Meredith, Thomas F. McGlone, Ignatius V. McGlone, Edward McGlone, Robert McGlone and Thomas F. McGlone, Jr., requiring each of them to show cause at the Surrogate's Court, Kings County, on the 17th day of January, 1938, why a decree as prayed for in said petition should not be made, and said citation having been returned with proof of due service thereof upon all of the parties named, and the said petitioners having duly appeared on the return day of the citation by Orr & Brennan, Esqs., their attorneys, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, and the Court having appointed George A. Voss, Esq., Special Guardian for Edward McGlone and Robert McGlone, infants, and the respondent, Helena Day McGlone, having duly filed her answer to the petition herein and having by stipulation dated September 14th, 1938, amended said answer, and Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq. their Special Guardian, having filed their answer to the petition herein, and Ignatius V. McGlone having filed his answer to the petition herein by George A. Voss, Esq., his attorney, and Thomas F. McGlone and Rose McGlone Meredith having filed their answer to the petition herein by Orr & Brennan, Esq., their attorneys, and the matter having come on for hearing and trial on the 25th day of May, 1939, and the petitioners having appeared by their attorneys, Orr & Brennan, Esqs. in support of said petition, and Thomas F. McGlone and Rose McGlone Meredith having appeared by their attorneys, Orr & Brennan, Esqs., and Edward McGlone and Robert McGlone, infants, having appeared by George A. Voss, Esq., their Special Guardian, and Ignatius V. McGlone having appeared by George A. Voss, Esq., his attorney, also in support of said petition, and the respondent, Helena Day McGlone, having appeared by Andrew F. Van Thun, Jr., Esq., her attorney, in opposition to the relief prayed for in said petition, and after hearing the proofs and allegations of the parties, and after filing his decision in writing, the Surrogate having by decree [fol. 87] dated June 27th, 1939, entered in the office of the Clerk of the Surrogate's Court, Kings County on said 27th

day of June, 1939, ordered, adjudged and decreed that the prayer of the petitioners as contained in the petition be denied in all respects, and ordered, adjudged and decreed that Helena Day McGlone, surviving spouse of the said John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day of September, 1937, is a valid and effective exercise of such election, and ordered, adjudged and decreed that the said Helena Day McGlone is entitled to one-half of the net estate of said deceased after the deduction of debts, funeral and administration expenses and any estate tax, and ordered, adjudged and decreed that Irving Trust Company and Thomas F. McGlone Jr., as executors aforesaid, pay to George A. Voss, Esq., special guardian of Edward McGlone and Robert McGlone, infants, the sum of $2,500.00 for services as such special guardian in this proceeding, and the said Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, the petitioners, and Thomas F. McGlone and Rose McGlone Meredith, and the above named Ignatius V. McGlone, and the above named Edward McGlone and Robert McGlone, infants, by George A. Voss, Esq., their Special Guardian, having appealed to the Appellate Division of the Supreme Court, Second Judicial Department, from that part and so much of said decree as denies the prayer of the petitioners as contained in the petition herein and orders, adjudges and decrees that Helena Day McGlone, surviving spouse of John J. McGlone, deceased, is entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said [fol. 88] decedent and that the notice of election pursuant to Section 18 of the Decedent Estate Law served by said Helena Day McGlone, filed and recorded in the office of the Clerk of the Surrogate's Court of the County of Kings on September 30th, 1937, is a valid and effective exercise of such election, and orders, adjudges and decrees that said Helena Day McGlone is entitled to one-half of the net estate of said deceased, after the deduction of debts, funeral and

administration expenses and any estate tax, and from each and every part of said decree, except so much of said decree as allows the sum of $2,500.00 to George A. Voss, Esq., Special Guardian of Edward McGlone and Robert McGlone, for his services as Special Guardian in this proceeding, and Ralph L. Kaskell, Jr., Esq., having been appointed and substituted as Special Guardian for said Edward McGlone and Robert McGlone, infants, in place and in stead of said George A. Voss, Esq., by order of the Surrogate of Kings County dated October 6th, 1939, and Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, having been substituted as the respondent herein in place and in stead of Helena Day McGlone, by order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Ralph L. Kaskell, Jr., as Special Guardian for said Edward McGlone and Robert McGlone, infants, having been substituted in place and in stead of said George A. Voss as Special Guardian for Edward McGlone and Robert McGlone, infants, by said order of the Appellate Division of the Supreme Court, Second Judicial Department, dated October 23rd, 1939, and said Appellate Division of the Supreme Court, Second Judicial Department, having heard this cause argued, and having ordered and adjudged that the said decree of the Surrogate's Court of the County of Kings so appealed from be unanimously reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and that the matter be remitted to the Surrogate's Court for the entry of [fol. 89] a decree as prayed for in the petition herein, and an order to this effect having been made and entered by the Appellate Division of the Supreme Court, Second Judicial Department, on January 29th, 1940, and an order making the said order of the Appellate Division the order and decree of the Surrogate's Court, Kings County, having been made by the Surrogate of the County of Kings on the 15th day of March, 1940, and the said Chase L. Day, as executor under the last Will and Testament of Helena Day McGlone, deceased, having appealed to the Court of Appeals of the State of New York from the said order of the Appellate Division of the Supreme Court, Second Department, dated January 29th, 1940, reversing the said decree of the Surrogate dated June 27th, 1939, and from the decree or order of the Surrogate's Court, Kings County, entered upon said

order of reversal of the said Appellate Division and dated the 15th day of March, 1940, except that part of the decree of the Surrogate entered on said order of reversal of the Appellate Division which allows the sum of $1,000.00 to Ralph L. Kaskell, Jr., special guardian for Edward McGlone and Robert McGlone, infants, for his services as special guardian, and the said appeal having come on to be heard before the Court of Appeals of the State of New York, and the said Court of Appeals having thereafter duly made an order dated the 31st day of December, 1940, whereby it was ordered and adjudged that the order of the Appellate Division of the Supreme Court so appealed from as aforesaid be reversed and the decree of the Surrogate's Court affirmed, with costs in this Court and in the Appellate Division to all parties filing briefs payable out of the estate, having ordered and adjudged that the proceedings therein be remitted to the Surrogate's Court, Kings County, and the Special Guardian having made and filed his report there to be proceeded upon according to law. Now, upon reading and filing the remittitur from the Court of Appeals therein, and the costs of the appellant Chase L. Day, as executor of the last Will and Testament of Helena Day McGlone, deceased, having been taxed and adjusted at the sum of [fol. 90] $338.95 and the costs of the respondent Irving Trust Company and Thomas F. McGlone, Jr., as executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, and Thomas F. McGlone and Rose McGlone Meredith, having been taxed and adjusted at the sum of $140.44, and the costs of the respondent Ralph L. Kaskell, Jr., as special Guardian for Edward McGlone and Robert McGlone, infants, having been taxed and adjusted at the sum of $119.05, and on motion of Andrew F. Van Thun, Jr., attorney for the said appellant, it is

Ordered, Adjudged and Decreed, that the order of the Court of Appeals be and the same is made the order and decree of this Court; and it is further

Ordered, Adjudged and Decreed, that the prayer of the petitioners, as contained in the petition be and the same is in all respects denied; and it is further

Ordered, Adjudged and Decreed that Helena Day McGlone, surviving spouse of the said John J. McGlone, deceased, was in her lifetime entitled to exercise her personal right of election to take against the terms of the Will and Codicil of said decedent, and that the notice of election pur-

suant to Section 18 of the Decedent Estate Law duly served by the said Helena Day McGlone on the said executors, and filed and recorded, with proof of due service thereof, in the office of the Clerk of the Surrogate's Court of the County of Kings on the 30th day of September, 1937, was and is a valid and effective exercise of such election; and it is further

Ordered, Adjudged and Decreed that Chase L. Day, as executor of the last Will and Testament of the said Helena Day McGlone, deceased, is entitled to take and receive as said executor one-half of the net estate of the said deceased, John J. McGlone, after the deduction of debts, funeral and administration expenses and any estate tax; and it is further

[fol. 91] Ordered, Adjudged and Decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to Chase L. Day, as executor of the last Will and Testament of Helena Day McGlone, deceased, the sum of $338.95, as and for his costs on said appeal and in the Appellate Division; and that it also pay to Ralph L. Kaskell, Jr., as special guardian of Edwa I McGlone and Robert McGlone, infants, the sum of $119.05, as and for his costs on said appeal; and that said Irving Trust Company and Thomas F. McGlone, Jr., as executors under the last Will and Testament and Codicil thereto of John J. McGlone, deceased, and Thomas F. McGlone and Rose McGlone Meredith, retain out of the moneys now in the hands of the executors, the sum of $140.44, as and for their costs on said appeal; and it is further

Ordered, Adjudged and Decreed that Irving Trust Company and Thomas F. McGlone, Jr., as executors aforesaid, pay to Ralph L. Kaskell, Jr., as special guardian of Edward McGlone and Robert McGlone, infants, the sum of Five hundred dollars, hereby allowed him for services as such special guardian on said appeal to the Court of Appeals.

G. A. W., Surrogate.

[fol. 92] In Court of Appeals of New York

[Title omitted]

Petition for Appeal—Filed March 27, 1941

To the Honorable Irving Lehman, Chief Justice of the Court of Appeals of the State of New York:

Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith, by Orr & Brennan, their attorneys, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, the above named appellants, complain and allege:

1. That this proceeding was commenced pursuant to Section 145-a of the Surrogate's Court Act upon the petition of the appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

2. That the issues in said proceeding were tried before the Surrogate of the County of Kings on the 25th day of May, 1939, and resulted in a decree (dated June 27th, [fol. 93] 1939), denying the prayer of the petitioners and adjudging that Helena Day McGlone, the surviving spouse of John J. McGlone, deceased, was entitled to exercise her right of election under Section 18 of the Decedent Estate Law, to take against the terms of the Will and Codicil of said decedent.

3. That the Appellate Division of the Supreme Court, Second Department, by order dated January 29th, 1940, unanimously reversed the decree of the Surrogate on the law and the facts, and directed the entry of a decree as prayed for in the petition. The said Court decided that Subdivision 9, Section 18 of the Decedent Estate Law invaded the contract rights which vested in the testator prior to its enactment; that it violated the rights guaranteed to the testator by Article I, Section 10 of the Constitution of the United States, and Article I, Section 6 of the Constitution of the State of New York; and that it is invalid insofar as it denies effect to an unacknowledged agreement of waiver or renunciation previously executed, which without acknowledgment, was valid at the time it was executed. On

the 15th day of March, 1940, a decree was entered in the Surrogate's Court, Kings County, upon said order of reversal.

4. That on the appeal by the respondent above named to the Court of Appeals of the State of New York, said Court, by order dated December 31st, 1940, reversed the order of the Appellate Division and decree of the Surrogate's Court entered thereon, and affirmed the original decree of the Surrogate. On the 24th day of January, 1941, a final judgment and decree was entered against your petitioners in the Surrogate's Court, Kings County, on the remittitur of the Court of Appeals of the State of New York, that being the highest Court of law or equity in the State of New York.

5. That said Court of Appeals held that the provision of Subdivision 9, Section 18 of the Decedent Estate Law which [fol. 94] requires that an agreement made before the taking effect of said section, wherein a spouse has waived or released all rights in the estate of the other spouse, shall be "duly acknowledged", is not in conflict with Article I, Section 10 of the Constitution of the United States, and does not violate the due process clause of the Constitution, all of which appears from the record and proceedings of the case and the opinion, decision and judgment of the Court. As a result thereof appellants have been greatly damaged.

6. That appellants have, with this petition, filed with the Clerk of said Court of Appeals of the State of New York, an assignment of errors setting out separately and particularly each error asserted by them, and also present herewith a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Wherefore, your petitioners pray the allowance of an appeal from said judgment to the Supreme Court of the United States to the end that the record in said matter may be removed into said Supreme Court and the errors complained of by your petitioners may be examined and corrected, and said judgment reversed.

Dated, March 18th, 1941.

Irving Trust Company, by George A. Murphy, Assistant Secretary; Thomas F. McGlone, Jr., As Executors under the Last Will and Testament and

Codicil thereto of John J. McGlone, deceased; [fols. 95-97] Thomas F. McGlone, Rose McGlone Meredith, Ralph L. Kaskell, Jr., Special Guardian of Edward McGlone and Robert McGlone, infants; Orr & Brennan, Attorneys for Appellant, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith. Office and P. O. Address, 16 Court Street, Brooklyn, N. Y.; Ralph L. Kaskell, Jr., Special Guardian per se. Office and P. O. Address, 159-24 Jamaica Avenue, Jamaica, N. Y.

Duly sworn to by George A. Murphy et al. Jurats omitted in printing.

[fol. 98] In Court of Appeals of New York

[Title omitted]

Assignment of Errors—Filed March 27, 1941

Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone, Rose McGlone Meredith, by Orr & Brennan, their attorneys, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, assign the following errors in the record and proceedings in the above entitled cause:

1. The Court of Appeals of the State of New York erred in holding that the provisions of Subdivision 9, Section 18 of the Decedent Estate Law of the State of New York, (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930), are not in conflict with and in violation of Section 10 of Article I of the Constitution of the United States which prohibits any State from passing a law impairing the obligations of contract.

[fol. 99] 2. Said Court of Appeals erred in holding that the provisions of Subdivision 9, Section 18 of the Decedent Estate Law of the State of New York, (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930), are not in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States which

prohibits any State from depriving persons of their property without due process of law.

3. Said Court of Appeals erred in holding that the decedent, John J. McGlone, did not acquire, by the instrument executed by Helena Day McGlone (then Helena Day Snyder), on February 2nd, 1922, contractual rights, protected by the Constitution of the United States, which have been invaded by Subdivision 9, Section 18 of said Decedent Estate Law.

4. Said Court of Appeals erred in holding that the obligations of contract between John J. McGlone and Helena Day McGlone were not impaired by the provision of Subdivision 9, Section 18 of said Decedent Estate Law requiring a waiver or release made before the effective date of the statute to be acknowledged.

5. Said Court of Appeals erred in holding that the appellants and the testator, John J. McGlone, were not deprived of their property without due process of law.

6. Said Court of Appeals erred in holding that the contractual rights acquired by the testator, John J. McGlone, pursuant to said instrument dated February 2nd, 1922, did not include the right to exclude his wife, Helena Day McGlone, from any share of his estate.

7. Said Court of Appeals erred in holding that said Helena Day McGlone did not waive her right to take any part of the estate of her husband-to-be, John J. McGlone.

8. Said Court of Appeals erred in holding that the instrument dated February 2nd, 1922, executed by Helena Day [fol. 100] McGlone may not be given effect as a waiver of a right to succeed to property of her husband, which the Legislature might thereafter create.

9. Said Court of Appeals erred in holding that an agreement, in contemplation of marriage, within the meaning of Section 53 of the Domestic Relations Law of the State of New York (Consolidated Laws, Chapter 14), made before the effective date of Section 18, Subdivision 9 of the Decedent Estate Law of the State of New York, and executed in a manner which satisfied the requirements of Section 31 of the Personal Property Law of the State of New York (Consolidated Laws, Chapter 41), whereby the wife-to-be

has waived or released all rights in the estate of her husband-to-be, is unenforceable if not acknowledged, though otherwise valid at the time it was executed.

10. Said Court of Appeals erred in holding that the facts in the case did not give rise to an estoppel or other equitable ground for denying to said Helena Day McGlone her statutory right to elect, as provided in Section 18 of said Decedent Estate Law of the State of New York

For which errors appellants pray that the order of the Court of Appeals of the State of New York, dated December 31st, 1940, and the decree dated January 24th, 1941, entered in the Surrogate's Court, County of Kings, upon the remittitur of the Court of Appeals, be reversed and a decree rendered in favor of the appellants.

Dated, March 18th, 1941.

Orr & Brennan, Attorneys for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith; Ralph L. Kaskell, Jr., Special Guardian appearing per se.

[fol. 101] In Court of Appeals of New York

[Title omitted]

Order Allowing Appeal—Filed March 27, 1941

The appellants above named having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled suit on the 24th day of January, 1941, in the Surrogate's Court, Kings County, on the remittitur of the Court of Appeals of the State of New York, and pursuant to the order of said Court dated December 31st, 1940, and from said order and from each and every part of said decree and order, and having presented and filed their Petition for Appeal, Assignment of Errors and Statement as to Jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It Is Ordered, that an appeal be and the same is hereby allowed to the Supreme Court of the United States, in the

above entitled cause, as provided by law, and it is further [fol. 102] Ordered, that the Clerk of the Court of Appeals of the State of New York prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme Court of the United States so that he shall have the same in said Court within twenty days of this date.

And It Is Further Ordered, that security for costs on appeal be fixed at the sum of Five Hundred ($500.00) Dollars. Said appellants now presenting their bond in the sum of Five Hundred ($500.00) Dollars executed by National Surety Corporation, as surety, it is further,

Ordered, that such bond be and the same is hereby approved.

Dated, New York, this 24 day of March, 1941.

Larry Lehman, Chief Judge of the Court of Appeals of the State of New York.

[fols. 103-105] Bond on Appeal for $500.00 filed March 27, 1941 omitted in printing.

[fol. 106] Citation in usual form showing service on Andrew F. Van Thun, Jr., filed March 27, 1941, omitted in printing.

[fol. 107] In Court of Appeals of New York

[Title omitted]

Praecipe for Transcript of Record

To the Clerk of the Surrogate's Court, Kings County:

You Are Hereby Requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above entitled cause, and to include in said transcript of record the following papers and exhibits, to wit:

1. Record on Appeal in the Court of Appeals of the State of New York, including specifically:

(a) Statement Under Rule 234.

(b) Notice of Appeal by Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith.

(c) Notice of Appeal by Ignatius V. McGlone.

(d) Notice of Appeal by Special Guardian for Edward McGlone and Robert McGlone, infants.

(e) Decree Appealed from.

(f) Petition, including Exhibit "A" and Exhibit "B", attached to Petition.

(g) Answer of Helena Day McGlone.

(h) Stipulation Amending Answer.

(i) Answer of Ignatius V. McGlone.

(j) Answer of Edward McGlone and Robert McGlone, infants, by Special Guardian.

[fol. 108] (k) Answer of Thomas F. McGlone and Rose McGlone Meredith.

(l) Hearing.

(m) Opinion.

(n) Stipulation Settling Case.

(o) Order Settling and Filing Case.

(p) Stipulation Waiving Certification.

(q) Order Filing Record in Appellate Division.

(r) Petitioner's Exhibit 1—Stipulation.

(s) Petitioner's Exhibit 2—Same as Exhibit "B" attached to Petition.

(t) Petitioner's Exhibit 3—Marriage Certificate.

(u) Notice of Appeal to Court of Appeals.

(v) Order Appealed from.

(w) Order on Appeal from Surrogate's Court.

(x) Opinion of Appellate Division.

(y) Stipulation Waiving Certification on Appeal to Court of Appeals.

2. Order of the Court of Appeals dated December 31st, 1940.

3. The opinion of the Court of Appeals.

4. The final decree dated January 24th, 1941, entered in the Surrogate's Court, Kings County, on the remittitur of the Court of Appeals.

5. The petition for appeal to the Supreme Court of the United States.

6. The assignment of Errors.

7. The order allowing the appeal and approving the bond.

8. The Statement of Jurisdiction.

9. The Citation on Appeal signed by the Chief Judge of the Court of Appeals of the State of New York.

10. The Bond for costs of appeal.

11. The Notice as to Paragraph 3, Rule 12 of the United States Supreme Court Rules

12. The Proof of Service of the Petition for Appeal, Order allowing Appeal, Assignment of Errors, Statement as to Jurisdiction, Bond, Notice with respect to Rule 12, Paragraph 3 of the Rules of the Supreme Court and Praecipe for transcript of record.

13. This Praecipe.

14. Appellee's statement opposing jurisdiction of the Court.

[fol. 109] Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States.

Dated, April 9th, 1941.

Orr & Brennan, Attorneys for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Thomas F. McGlone and Rose McGlone Meredith; Ralph L. Kaskell, Jr., Special Guardian per se.

The undersigned acknowledges service of a copy of the foregoing Praecipe for Transcript of Record, and hereby waives designation of Counter-Praecipe.

Dated, April 9th, 1941.

Andrew F. Van Thun, Jr., Attorney for Appellee, Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased.

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed April 24, 1941

The appellants in the above entitled cause adopt their Assignment of Errors as their statement of the points to

be relied upon, and state that the whole of the record as filed is necessary for the consideration of the case.

Dated, April 23rd, 1941.

Philip Zierler, Counsel for Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian for Edward McGlone and Robert McGlone, infants.

Service of the foregoing statement and designation upon the undersigned is hereby acknowledged this 23 day of April, 1941.

Andrew F. Van Thun, Jr., Attorney for Appellee.

[fol. 112] [File endorsement omitted]

Endorsed on Cover: File No. 45,317 New York, Surrogate's Court, Kings County, Term No. 968. Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, et al., Appellants, vs. Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased. Filed April 21, 1941. Term No. 968 O. T. 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~968~~ 57

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, ET AL.,

Appellants,

vs.

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

APPEAL FROM THE SURROGATE'S COURT OF KING'S COUNTY OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

WILLIAM H. ORR,
LENNOX C. BRENNAN,
RALPH L. KASKELL, JR.,
Counsel for Appellants.

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COURT OF APPEALS OF THE STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION OF IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, FOR A DETERMINATION OF THE RIGHT OF HELENA DAY McGLONE TO ELECT UNDER SECTION 18 OF THE DECEDENT ESTATE LAW TO TAKE AGAINST THE PROVISIONS OF SAID LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED.

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, THOMAS F. McGLONE, ROSE McGLONE MEREDITH, EDWARD McGLONE AND ROBERT McGLONE, INFANTS, by RALPH L. KASKELL, JR., SPECIAL GUARDIAN,

Appellants,

against

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED,

Respondent.

STATEMENT IN SUPPORT OF JURISDICTION.

The appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone, Rose McGlone Meredith, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represent:

(A) Statutory Provisions Sustaining Jurisdiction.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344 (a)

of Title 28 of the United States Code, reading, to the extent relevant here, as follows:

> "Sec. 344 (a). Final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

(B) Statute of the State, the Validity of Which is Involved.

The statute of the State of New York, the validity of which has been sustained by the Court of Appeals of the State of New York, the highest Court of said State, as not being violative of or repugnant to the Constitution and Laws of the United States, is Subdivision 9, Section 18 of the Decedent Estate Law (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930). The provisions thereof are:

> "9. The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed, made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

(C) Date of Judgment and Date of Application for Appeal.

The date of the final decree, entered in the Surrogate's Court, Kings County upon the remittitur of the Court of Appeals of the State of New York, which is now sought to

be reviewed, is January 24th, 1941, and the date of the final order of the Court of Appeals which is also sought to be reviewed, and pursuant to which said final decree was entered, is December 31st, 1940. The time for taking the appeal began to run on the date of the entry of the final decree in the Surrogate's Court, King's County, to wit, January 24th, 1941. The date on which the application for appeal was presented was the 24th day of March, 1941.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellants may bring their appeal within three months after the entry of said decree in the Surrogate's Court, Kings County.

(D) Nature of Case and Rulings Below.

The decedent, John J. McGlone and Helena Day McGlone (then Helena Day Snyder) were married in England on February 4th, 1922. This was his first and her third matrimonial experience, she having first been married to one by the name of Lewis and secondly to a man named Snyder. Mrs. Snyder had no children. She was about sixty-two years old when she married Mr. McGlone. On or about February 2nd, 1922, or about two days before her marriage to Mr. McGlone, she made and delivered to him a document on a letterhead of the Savoy Hotel, London, reading as follows:

"The Beverleys,
Osterley, Middlesex, England.
February 2, 1922.

Savoy Hotel,
London
WC2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that,

as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.

HELENA DAY SNYDER.

There was no issue of the marriage between John J. McGlone and Helena Day Snyder.

John J. McGlone died on February 22nd, 1937. He left him surviving his widow, Helena Day McGlone, a sister, Rose McGlone Meredith, two brothers, Thomas F. McGlone and Ignatius V. McGlone, and three nephews, Thomas F. McGlone, Jr., Edward McGlone and Robert McGlone, the last two named being infants over the age of fourteen years.

The Last Will and Testament of John J. McGlone was executed on August 21st, 1930. This was prior to the effective date of Section 18 of the Decedent Estate Law.

The third paragraph of the Will reads as follows:

"THIRD: My dear wife, HELENA DAY MCGLONE, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character."

On July 6th, 1934 (after the effective date of Section 18 of the Decedent Estate Law) said John J. McGlone

executed a Codicil to said Last Will and Testament. This Codicil did not disturb the foregoing provision of the Will.

Said Last Will and Testament and Codicil thereto were admitted to probate on April 8th, 1937, on which date Letters Testamentary were issued to appellants, Irving Trust Company and Thomas F. McGlone, Jr.

On September 23rd, 1937, said Helena Day McGlone served a notice of election to take her share of the estate as in intestacy pursuant to the provisions of Section 18 of the Decedent Estate Law. This proceeding was then commenced by the Executors. One George A. Voss, Esq., was appointed Special Guardian for said infants, Robert McGlone and Edward McGlone, and as such Special Guardian and also as attorney for Ignatius V. McGlone, served and filed an answer consenting to a decree as prayed for in the petition. Thomas F. McGlone and Rose McGlone Meredith served and filed an answer also consenting to a decree as prayed for in the petition. The widow, Helena Day McGlone, served and filed an answer, which was amended by stipulation. The answer contained no affirmative defense.

A motion for judgment on the pleadings was made by all parties (Papers on Appeal, In re McGlone's Will, 256 App. Div. 1074, 11 N. Y. Supp. 2nd, page 3). This motion was denied by the Surrogate upon the ground that a presumption of fraud flows from the mere relationship of the parties, and that it was necessary for the petitioners to plead and prove as part of their *prima facie* case that the agreement was not induced by fraud or inequitable conduct. The order denying the motion for judgment on the pleadings was affirmed, but the Appellate Division reversed the Surrogate on the law of the case, holding:

> "In the opinion of this court no presumption exists by reason of the relation existing between the parties, at the time the paper writing was made and delivered. Matter of Rogers' Will, 250 App. Div. 26, 293 N. Y. S.

626. The burden of pleading inequality, fraud or overreaching is upon the widow".

Mrs. McGlone did not amend her answer.

The case was tried on May 25th, 1939. In presenting their *prima facie* case petitioners relied upon the admissions in the pleadings and three documents which were received in evidence without objection.

The first of these was a stipulation dated September 14th, 1938, by which Mrs. McGlone admitted the delivery to Mr. McGlone of the paper writing above referred to at the time of its execution, and amended her answer accordingly. The second was the aforementioned agreement signed by Mrs. McGlone (then Helena Day Snyder). Mrs. Snyder's signature was conceded to be valid. The third was the authenticated record of the marriage, which disclosed that Mr. McGlone was then forty-seven years of age and the Vice-President of the International Mercantile Marine Co., and that Mrs. Snyder represented herself to be forty-five years of age. The proof revealed that the statement as to her age was untrue; that her real age was sixty-two.

The Surrogate decided that Mrs. McGlone had not waived or released her right to elect under Section 18 of the Decedent Estate Law and had effectively exercised such right of election.

Mrs. McGlone died after the trial and entry of the original decree, and the proceeding thereafter became a contest between the brothers, sister and nephews of Mr. McGlone and the next of kin of Mrs. McGlone.

The Appellate Division unanimously reversed on the law and the facts.

The Appellate Division found and decided that the agreement was made by Mrs. McGlone voluntarily, understandingly and under circumstances which were free from inequality and unfairness; that it had a valid consideration;

that it was made to induce the marriage, and that the marriage constituted the consideration. That Court further stated in its opinion, (258 App. Div. 596, 17 N. Y. Supp. 2nd 316 at 322, 323):

"When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (sec. 53, Domestic Relations Law, sec. 31, subdiv. 3, Personal Property Law), which did not require an acknowledgment; and an antenuptial agreement made in a foreign country is enforcible in this state (Lemye *v.* Sirker, 226 App. Div. 159, 161, Ross *v.* Ross, No. 1, 233 App. Div. 626).

This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (Laws of 1929, chap. 229). The subsequent enactment therefore violated the testator's constitutional rights (U. S. Const., art. 1, sec. 10; N. Y. State Const., art. 1, sec. 6). By the former a state is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGloae prior to its enactment, it is invalid (Walker *v.* Whitehead, 83 U. S. 314; Edwards *v.* Kearzey, 96 U. S. 595; Tennessee *v.* Sneed, 96 U. S. 69; Louisiana *v.* New Orleans, 102 U. S. 203; McCahey *v.* Virginia, 135 U. S. 662; Coolidge *v.* Long, 282 U. S. 582; Holmes *v.* Holmes, 4 Barb. 295, 303; Ralph *v.* Cronk, 266 N. Y. 428; Matter of Goldberg, 275 N. Y. 186, 189).

The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words "so executed". It is universally recognized that a statute may be constitational in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary events. 'The question is in

every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether' (People ex rel. Alpha P. C. Co. *v.* Knapp, 230 N. Y. 48, 54, 60, per Cardozo, J.; People *v.* Mancuso, 255 N. Y. 463, 472, 473). The deletion of the words "so executed" does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting than was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

This view has the further effect of recognizing that the sentence with the deletion of the words "so executed" becomes declaratory, in substance, of the pre-existing statute law (sec. 53, Dom. Rel. Law; sec. 31, subdiv. 3, Pers. Prop. Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid".

Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, then appealed to the Court of Appeals of the State of New York. That court reversed the order of the Appellate Division and decree of the Surrogate's Court entered thereon, and affirmed the original decree of the Surrogate. A final judgment and decree, on the remittitur of the Court of Appeals was thereupon entered in the Surrogate's Court, Kings County, on the 24th day of January, 1941.

The Court of Appeals did not disagree with any of the findings of the Appellate Division, except its conclusion that the statute aforementioned is repugnant to the Consti-

tution of the United States and invaded the contract rights which vested in the decedent prior to its enactment.

Annexed hereto and made part hereof are the opinions of the Appellate Division and Court of Appeals above referred to. Also annexed hereto and made part hereof is a copy of the opinion of the Surrogate of Kings County rendered after the trial of the issues in this proceeding.

(E) Substantiality of Questions Involved.

Appellants respectfully submit that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature, although it is well established that an appeal will not be dismissed for want of a substantial Federal question unless the contentions of the apellant are "clearly not debatable and utterly lacking in merit". *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 258.

The estate of the decedent, as valued in the estate tax proceedings, amounted to $236,852.74. As a result of the decision of the Court of Appeals, one-half of the net amount of this estate will be taken from the brothers, sister and nephews of Mr. McGlone and turned over to Mrs. McGlone's next of kin, a result which is clearly contrary to the spirit and letter of the agreement between the parties, and the provisions of Mr. McGlone's Will and Codicil. The unanimous opinion of the Appellate Division that the statute invaded the constitutional rights of the testator and is invalid indicates that the contentions of the appellants are not lacking in merit. These contentions should be passed upon by the Supreme Court of the United States before a result so unjust becomes absolute.

Further, the appeal presents a question, the determination of which is important to all persons who prior to the effective date of Section 18 of the Decedent Estate Law

entered into an agreement, which is subscribed but not acknowledged, under which either or both of the parties waived all interest in the estate of the other. The Court of Appeals held such an agreement ineffective upon the ground that the right of election may not be waived in advance of its creation. The decision of the court on that question is directly contrary to the unanimous decision of the Appellate Division, Fourth Department (concurred in by Justices Sears and Lewis, when members of that court) in the case of *In re Smith's Estate*, 243 App. Div. 348, 276 N. Y. Supp. 647 at 651. In that case the court said:

> "If the execution of this release was the free and unrestrained act of the appellant, and if her intention to relinquish every right which she had or might thereafter have in her husband's estate is clear and certain, then, undoubtedly, the instrument will prevent her from taking advantage of her statutory privilege of election, even though that right did not exist at the time of the execution of the release."

Unless this decision is reversed all such agreements will be nullified, notwithstanding the fact that they were entered into in good faith for a valid consideration, and clearly indicate an intention to relinquish every right in the estate of the deceased spouse.

Furthermore, this decision makes it impossible for two people hereafter to effect a binding contract in contemplation of marriage by the terms of which either or both waive all interest in the estate of the other, since under this decision the Legislature can render such contract ineffective by a subsequent enactment modifying rights of inheritance and recognizing a waiver only if executed in a manner not theretofore required.

For the reasons aforementioned, the appeal presents a substantial Federal question. *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476.

The Supreme Court has jurisdiction to entertain an appeal from the decision of the State court on the ground that a State statute violates a clause or clauses of the Constitution of the United States. *Smith* v. *Cahoon*, 283 U. S. 553; *Aero Mayflower Tea Co. v. Georgia Public Service Commission*, 295 U. S. 285; *Hartford Steam Boiler Co.* v. *Harrison, Insurance Commissioner*, 301 U. S. 459; *American Toll Bridge Co.* v. *Railroad Comm.*, 307 U. S. 486; *Curry* v. *McCanless*, 307 U. S. 357; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95.

The Federal questions were raised by the appellants above named at all stages of this proceeding from its very inception. They raised the Federal questions by motion for judgment on the pleadings before trial, by brief submitted in connection with the trial and upon both appeals in the Appellate Division and the appeal to the Court of Appeals.

Appellants respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

ORR & BRENNAN,
Attorneys for Petitioners-Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Rose McGlone Meredith and Thomas F. McGlone.

RALPH L. KASKELL, JR.,
Special Guardian Appearing per se.

EXHIBIT "A".

COURT OF APPEALS, TUESDAY, DECEMBER 31, 1940.

In the Matter of the Application of IRVING TRUST COMPANY and THOMAS F. MCGLONE, JR., as Executors under the Last Will and Testament and Codicil Thereto of JOHN J. MCGLONE, Deceased, for a Determination of the Right of HELENA DAY MCGLONE to Elect under Section 18 of the Decedent Estate Law to Take Against the Provisions of Said Last Will and Testament and Codicil Thereto of JOHN J. MCGLONE, Deceased.

IRVING TRUST COMPANY, et al., Respondents; CHASE L. DAY, as Executor under the Last Will and Testament of HELENA DAY MCGLONE, Deceased, Appellant.

(Decided December 31, 1940.)

Appeal by executor from unanimous order of Appellate Division, second department, reversing Surrogate on law and facts. Matter remitted.

Andrew F. Van Thun, Jr., for appellant.

Ralph L. Kaskell, Jr., and Philip Zierler for respondents.

LEHMAN, Ch. J.:

The widow of John J. McGlone, a resident of Kings county, who died in February, 1937, served notice upon the executors under his last Will and testament that she elected to take her share of the decedent's estate "as in intestacy" pursuant to section 18 of the Decedent Estate Law (Cons. Laws, ch. 13) (added by chapter 229 of the Laws of 1929 and thereafter amended). The executors, claiming that the widow had waived and renounced all rights in her husband's estate, instituted proceedings pursuant to section 145-a of the Surrogate's Court Act for a determination of the validity and effect of the widow's attempted election. The Surrogate sustained the widow's right to an election. The Appellate Division reversed the decree of the Surrogate and remitted the matter to the Surrogate's Court for the entry

of a decree determining that an instrument executed by the widow in February, 1922, constitutes "a complete bar to the right of the widow to elect to take against the will and codicil of the testator".

On February 4, 1922, the decedent, John J. McGlone, and Helena Day Snyder were married in England. In contemplation of that marriage Helena Day Snyder, on February 2, 1922, signed the paper writing which, it has been held, bars her right to take a share in her husband's estate. It reads as follows: "I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized". She was at that time sixty-two years of age.

The decedent provided as follows for his wife in the third paragraph of his will, which he executed on August 21, 1930: "Third. My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character".

At the time he executed the will, section 18 of the Decedent Estate Law was not yet in effect and a husband was free to bequeath all his property to strangers. His wife would, in such case, have no right to any share in his estate, though she would have a right of dower in his real property, except

as she might have parted with, waived or lost such right of dower.

Thereafter, however, on July 6, 1934, the testator executed a codicil to the will of August 21, 1930. He did not therein make any additional provision for his wife or disturb the provision previously made; but since the term "will" as defined in the statute includes all codicils as well as will (Decedent Estate Law, Sec. 2), his wife, by force of the statute, became entitled upon the execution of the codicil to a right of election to reject the provision made for her in the will and to take her share of the estate "as in intestacy". Then, for the first time, the question became important whether the renunciation by the wife in 1922 of "all her right, title and interest in any estate real or personal" of which her "husband to be, John J. McGlone, might die seized" has the effect of barring her from asserting her statutory right of election created by a later statute.

The same section of the statute which creates, for the benefit of the surviving spouse of a decedent, a right not previously enjoyed, also provides the manner in which that right may be waived. "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement *so executed* made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section". (Decedent Estate Law, Sec. 18, subd. 9.) The statute was intended, it is plain, to deny effect to a waiver not executed in accordance with the statute.

The statute requires that the agreement or instrument of waiver shall be "duly acknowledged" as well as subscribed and the instrument of waiver upon which the executors and legatees rely to defeat the right of election claimed by the widow was subscribed but not acknowledged by her. For that reason, as well as on other grounds, the Surrogate found that the instrument was without effect. The reversal by the Appellate Division is based upon its conclusion that

in so far as the statute denies effect to an unacknowledged agreement of waiver or renunciation, previously executed which, even without acknowledgment, was valid at the time it was executed, the statute violates the testator's constitutional rights guaranteed by article 1, section 10, of the Constitution of the United States and by article 1, section 6, of the Constitution of this State, and is, therefore, void. The Appellate Division rejected, for reasons stated in the opinion, the other grounds upon which the Surrogate based his contention that the waiver was ineffective.

We have examined these other grounds and without now deciding whether all of them are without substance we assume that the Appellate Division did not err in rejecting them; but we are constrained to disagree with the conclusion of the Appellate Division that the testator acquired by the instrument, executed in 1922 in contemplation of marriage, contractual rights, protected by the Constitution of the United States, which have been invaded by the new statute. We may assume, without now deciding or even considering such questions further, that the instrument of waiver, though unilateral in form, evidences "a contract made between persons in contemplation of marriage" within the meaning of section 53 of the Domestic Relations Law (Cons. Laws, ch. 14); that it is executed in manner which satisfies the requirements of section 31 of the Personal Property Law (Cons. Laws, ch. 41); and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law. That brings us to the question; what are those contractual or property rights which it is said are destroyed by the new statute?

Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of the estate of her "husband to be" which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the prop-

erty of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights. (Matter of Sherman, 153 N. Y. 1; Norris *v.* Beyea, 13 N. Y. 273.) A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver.

The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly-created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she would not otherwise have. That does not, however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right.

The order of the Appellate Division should be reversed and the decree of the Surrogate's Court affirmed, with costs in this court and in the Appellate Division to all parties filing briefs payable out of the estate.

Loughran, Finch, Rippey, Sears, Lewis and Conway, JJ., concur. Ordered accordingly.

EXHIBIT "B".

SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

LAZANSKY, *P. J.*, CARSWELL, JOHNSTON, ADEL and CLOSE, *JJ.*

In the Matter of The Application of IRVING TRUST COMPANY and THOMAS F. MCGLONE, JR., as Executors under the Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased, for a Determination of the Right of Helena Day McGlone to Elect under Section 18 of the Decedent Estate Law to Take Against the Provisions of Said Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased; IRVING TRUST COMPANY and THOMAS F. MCGLONE, JR., as Executors, etc., of the Estate of John J. McGlone, Deceased, and EDWARD MCGLONE and ROBERT MCGLONE, Infants, by RALPH L. KASKELL, JR., Special Guardian, IGNATIUS V. MCGLONE, THOMAS F. MCGLONE and ROSE MCGLONE MEREDITH, *Appellants;* CHASE L. DAY, as Executor under the Last Will and Testament of HELENA DAY MCGLONE, Deceased, *Respondent.*

Appeal by Irving Trust Company and Thomas F. McGlone, Jr., as executors, etc., of the estate of John J. McGlone, deceased, and by others, from a decree of the Surrogate's Court of the County of Kings, entered in the office of the clerk of said court on the 27th day of June, 1939.

Philip Zierler, for appellants Irving Trust Company and Thomas F. McGlone, Jr., as executors, etc., of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian, for appellants Edward McGlone and Robert McGlone.

Andrew F. Van Thun, Jr. (George H. Burtis with him on the brief), for the respondent.

CARSWELL, *J.*:

The executors of the testator petitioned that it be decreed that his widow was not entitled to elect, under section 18, Decedent Estate Law, to take against his will and codicil. Upon the executors' proof, the widow adducing none, the Surrogate decreed that the widow had the right so to elect and had effectively exercised it. The executors and certain next of kin of the testator appeal. The widow died after the decree was entered and has been succeeded by her executor. This proceeding, therefore, has become a contest between the brothers, sister and nephews of the husband and three nieces of the widow.

The facts are not in dispute. They are contained in the pleadings, certain stipulations and two documents.

On February 2, 1922, the testator John J. McGlone and Mrs. Helena Day Snyder, American Citizens, were in London, England. On that day Mrs. Snyder signed a document. She recited in it that she was of sound mind and, as the occasion was the eve of her marriage to McGlone on February 4, 1922, she wished to record of her own free will that she had ample property and a fortune of her own and as a compliment to her prospective husband and for other good reasons she voluntarily and irrevocably renounced all right, title and interest that she might have, legally or otherwise, to share in any estate of McGlone of which he might die seized. This instrument in script, on a letterhead of the Savoy Hotel, was in the handwriting of an unidentified person. Mrs. Snyder's signature was conceded to be valid.

On February 4, 1922, McGlone and Mrs. Snyder were married. This was his first and her third marital venture. The authenticated record of the marriage discloses that McGlone was forty-seven years of age and an officer of a steamship line, and that Helena Day Snyder was forty-five years of age and a widow. The proof reveals this reference to forty-five years was incorrect; that her real age was

sixty-two. She had no children by her prior marriages nor by this one.

On August 21, 1930, as a resident of Brooklyn, McGlone made a will in which he recited the execution by his wife of the February 2, 1922, document waiving all claim to any interest in his estate. He nevertheless provided that $2,000 should be used to purchase a token for her. On July 6, 1934, he executed a codicil which did not disturb the foregoing provision in the will.

On February 22, 1937, McGlone died. His will was admitted to probate on April 8, 1937. The widow executed and filed on September 23, 1937, an instrument purporting to be a notice of election, pursuant to section 18, Decedent Estate Law, to take against the will and codicil.

The first question is whether on the foregoing proof a presumption of constructive fraud arose from the mere relation of the parties at the time the February 2, 1922, instrument was signed; and whether because of such a presumption the executors were obligated to adduce affirmative proof that the parties dealt with each other on terms of equality and fairness and that the act of Mrs. Snyder was voluntary and well understood.

The respondent invokes such a presumption. It concerns elements which are a species of fraud. The general rule is that fraud vitiates all contracts, but that it is not presumed. An exception arises when the relations of the parties to a contract evoke a presumption of constructive fraud, which presumption requires one invoking the contract to prove affirmatively that it was not the product of undue influence, inequality, overreaching, deception or mistake. This presumption is ordinarily applied to the relationship of guardian and ward; trustee and cestui que trust; attorney and client; and physician and patient. It is also applied to other close relationships when it is affirmatively established by proof of circumstances that the parties are not dealing on an equal basis. (*Cowee* v. *Cornell*, 75 N. Y. 91, 99.) The presumption does not arise from the mere relation of parent and child. (*Cowee* v. *Cornell*, *supra*, p. 101; *Carpenter* v. *Soule*, 88 N. Y. 251, 256; *Jones* v. *Jones*, 137 N. Y. 610, 613; *Williams* v. *Whittel*, 69 App. Div. 340, 344.) Under the rule which stems from the foregoing cases,

no presumption arises merely from the equally close relation of husband and wife. (*La Tourette* v. *La Tourette*, 54 App. Div. 137, 138; *Green* v. *Benham*, 57 App. Div. 9, 14; *Doulon* v. *Doulon*, 154 App. Div. 212, 216, 217; *Matter of Rogers*, 250 App. Div. 26, 28; leave to appeal denied, 274 N. Y. 642; 30 C. J., 668, s. 244.) These cases enforce the rule that in such relationships, whether a presumption of inequality or constructive fraud arises "is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely." (*Cowee* v. *Cornell*, *supra*, p. 101.) "The law does not presume aught" from this type of mere relationship. (*Williams* v. *Whittel*, *supra*, p. 344.) Judicial utterances, invoked to support a contrary view, are to be found only in cases, otherwise authoritative, where there was affirmative proof of circumstances of inequality which raised a presumption of constructive fraud and shifted to the proponent of the instrument the burden of going forward with proof that it was executed with understanding, without overreaching and free from any vitiating element. It is when a vitiating element, even though slight, appears that such an agreement is subjected to searching scrutiny. The latter type of cases involving the relationship of parent and child (*Green* v. *Rowcroft*, 113 N. Y. 462; *Barnard* v. *Gantz*, 140 N. Y. 249), and the relationship of husband and wife (*Pierce* v. *Pierce*, 71 N. Y. 154; *Graham* v. *Graham*, 143 N. Y. 573; *Lamb* v. *Lamb*, 18 App. Div. 250) is not applicable here. When properly read and analyzed, they manifest no essential conflict with the cases which control the instant case.

The burden of proving that the instrument of February 2, 1922, was validly executed rested upon the executors. (30 C. J. 668, s. 244; *In re Dunn's Estate*, *Dunn* v. *Dunn*, 224 N. W. 38 (Iowa).) The unchallenged proof that this instrument was genuine was sufficient to establish *prima facie* that it was binding upon the widow. (*Pimpinello* v. *Swift & Co.*, 253 N. Y. 159, 162; *Matter of Stone*, 272 N. Y. 121, 124.) The executors were not obligated to come forward with further proof in the absence of proof from the widow indicating that she dealt with her prospective husband under circumstances of inequality, or with lack of understanding of the effect of her act. If such proof, even though slight, had been

forthcoming, the burden or duty of going forward to rehabilitate the *prima facie* binding force of the instrument would then have shifted to the executors. The widow in seeking to repudiate her solemn writing was not aided by or armed with a presumption of inequality (*La Tourette* v. *La Tourette*, *supra*) in the absence of some proof casting suspicion upon or tending to vitiate the instrument.

It has long been the practice of courts to enforce antenuptial agreements, whether they related to existing or after acquired property, as such agreements are favored. (*Johnston* v. *Spicer*, 107 N. Y. 185, 194; *Matter of Estate of Young* v. *Hicks*, 92 N. Y. 235; *Green* v. *Benham*, *supra*.) The relationship between husband and wife is, of course, sufficiently close and confidential to require but little affirmative proof in order to cast the burden upon one invoking an instrument executed by a spouse to come forward with affirmative proof that it was executed under circumstances of equality and fairness. This proof may take the form of lack of knowledge on the part of the one resisting the instrument; differences in knowledge of the respective parties; differences in mental or bodily strength; or unfairness and the like. The instrument itself may reveal want of fairness and lack of equality. But none of these elements is present here. The widow might have created the presumption she invokes and cast the burden upon the executors of establishing the fairness of the instrument and its inequality, if she had made proof—no doubt readily available to her if it were the fact—that the recitals in the instrument were untrue; and by reason of such a circumstance the inference might have been drawn that she was not dealing on a plane of equality with McGlone. She proffered no such proof, so that the recital of admissions made by her must be deemed to be true.

This view makes the executors' proof take on added strength because the instrument furnishes evidence or affirmative proof, by these recitals, in the absence of repudiation or challenge of them by the widow, that she dealt with McGlone under circumstances that were free from inequality and unfairness. The document contains internal evidence that she was possessed of an independent fortune and that because thereof she understandingly renounced any

interest in her prospective husband's estate. Another circumstance in the record affirmatively points the same way. The marriage record discloses that the marriage took place two days after the instrument was signed. She gave her age as forty-five, when the fact is that she was sixty-two years of age when she married McGlone, who was then forty-seven years of age. This fact, and the further fact that it was her third marriage, give rise to implications that she was not lacking in experience or suffering from inequality. These facts also carry the further implication that the instrument was signed to induce the marriage.

These views respecting burden of proof were stated more briefly on a prior appeal in this case (256 App. Div. 1074) and result from a re-examination of the subject.

The next question concerns whether the form of the instrument of February 2, 1922, complies with section 18, subdivision 9, of the Decedent Estate Law. It was not executed by both spouses. It was not necessary that it should be so executed. A unilateral agreement is sufficient when it is acted upon by the other spouse. (*Matter of Moore*, 165 Misc. 683.) This view is in accord with the law as it existed before the enactment of that section. Under pre-existing statutes a unilateral agreement affecting the marriage relation and rights thereunder, when acted upon, was valid. (s. 53, Dom. Rel. Law; s. 31, subdiv. 3, Pers. Prop. Law; *Wright* v. *Wright*, 54 N. Y. 437; 30 C. J., 628, s. 185.)

It is asserted however that this instrument was merely subscribed and not acknowledged, as required by section 18, subdivision 9, Decedent Estate Law. That subdivision reads:

"The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement *so executed* made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

The last sentence is the one here applicable. The words "so executed" contained therein incorporate by reference the requirement in the preceding sentence that the subscription shall be "duly acknowledged." The instrument therefore of February 2, 1922, does not comply with this requirement.

This necessitates determining whether the above last sentence is constitutional. If it is invalid the lack of an acknowledgment is not fatal to the instrument. When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (s. 53, Dom. Rel. Law; s. 31, subdivision 3, Pers. Prop. Law), which did not require an acknowledgement; and an antenuptial agreement made in a foreign country is enforceable in this State. (*Lemge* v. *Sirker*, 226 App. Div. 159, 161; *Ross* v. *Ross*, No. 1, 233 App. Div. 626.)

This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (Laws of 1929, chap. 229). The subsequent enactment, therefore, violated the testator's constitutional rights. (U. S. Const., Art. 1, s. 10; N. Y. State Const., Art. 1, s. 6.) By the former a State is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid. (*Walker* v. *Whitehead*, 83 U. S. 314; *Edwards* v. *Kearzey*, 96 U. S. 595; *Tennessee* v. *Sneed*, 96 U. S. 69; *Louisiana* v. *New Orleans*, 102 U. S. 203; *McCahey* v. *Virginia*, 135 U. S. 662; *Coolidge* v. *Long*, 282 U. S. 582; *Holmes* v. *Holmes*, 4 Barb. 295, 303; *Ralph* v. *Cronk*, 266 N. Y. 428; *Matter of Goldberg*, 275 N. Y. 186, 189.)

The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words "so executed." It is universally recognized that a statute may be constitutional in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary events. "The

question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." (*People ex rel. Alpha P. C.* v. *Knapp*, 230 N. Y. 48, 54, 60, per Cardozo, J.; *People* v. *Mancuso*, 255 N. Y. 463, 472, 473.) The deletion of the words "so executed" does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting than was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

This view has the further effect of recognizing that the sentence with the deletion of the words "so executed" becomes declaratory, in substance, of the pre-existing statute law (s. 53, Dom. Rel. Law; s. 31, subdiv. 3, Pers. Prop. Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid.

This leaves one further question—that of consideration. The February 2, 1922, instrument had a valid consideration. The marriage constituted that consideration. It has long been recognized as "among the highest consideration known to the law." (*Kramer* v. *Kramer*, 90 App. Div. 176, 180; *DeCicco* v. *Schweizer*, 221 N. Y. 431, 438, 440; *Matter of Miller*, 77 App. Div. 473; *Wright* v. *Wright*, 54 N. Y. 437; *American Surety Co.* v. *Conner*, 251 N. Y. 1, 11.)

Accordingly, the instrument of February 2, 1922, under the proof herein constituted a complete bar to the right of the widow to elect to take against the will and codicil of the testator.

The decree of the Surrogate's Court of Kings County, in so far as appealed from, should be reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and the matter re-

mitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein.

EXHIBIT "C".

THE NEW YORK LAW JOURNAL, TUESDAY, JUNE 13, 1939.

Surrogate's Court.

By Mr. Surrogate Wingate.

Matter of Irving Trust Co., &c. (John J. McGlone, dec'd; File No. 1714, 1937)—In view of the earnest and repeated efforts of the petitioners to defeat the present widow's right of election without a hearing on the merits (Matter of McGlone, 166 Misc., 636; 169 Misc., 498, aff'd 11 N. Y. S., 2d, 3, not yet otherwise reported), the actual trial of the issues appeared as something of an anti-climax.

No testimony was introduced, the composite showing being the introduction into evidence of three documents, namely, first, a stipulation amending the answer of the widow so as to admit her subscription and delivery of the paper upon which her opponents rely to defeat her rights; secondly, the paper itself; and thirdly, a certified copy of the marriage certificate of the parties, showing the consummation of their marriage on February 4, 1922. Finally a stipulation was entered on the record that the asserted renunciation or waiver by the present widow of rights in the estate of her husband was not in her handwriting but in that of some other unidentified individual and that the only portion thereof which was written by her was the signature.

It follows, both sides having rested, that the issue raised by the executors to the effect that the widow is precluded from exercising her asserted right of election must be determined on this meagre demonstration and on the showing of the record, consisting preponderantly of the allegations of the petition in so far as they are not denied.

In view of the denials of paragraphs seventh to eleventh of the petition except for the admission in paragraph two

of the answer that the widow signed and delivered to the decedent the alleged waiver, and the failure to introduce any evidence in support of the allegations therein made, they must, except for the noted admissions be excluded from consideration in the evaluation of the composite situation.

As thus reduced to lowest terms, the record demonstrates that the parties validly intermarried on February 4, 1922. Two days prior to the solemnization of the nuptials, the present widow signed and turned over to the decedent a document which had not been prepared by her, and "knowledge of the nature, terms and effect" of which she denies. This document reads as follows:

"I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized, Helena Day Snyder."

The decedent died a resident of this county on February 22, 1937, survived by the widow, a sister, two brothers, and three nephews, sons of deceased brothers, as his only statutory distributees. His estate as valued in the estate tax proceedings, of which this court may take judicial notice (Matter of Surpless, 143 Misc., 48, 50; Matter of Moringstar, 143 Misc., 620, 623; Matter of Blake, 146 Misc. 780, 781-782; Matter of Goldwitz, 153 Misc., 182, 184; Matter of Greenberg, 158 Misc., 446, 448; Matter of Reilly, 165 Misc., 214, 218; Matter of Grube, 7 N. Y. S. 2d, 794, 798, not otherwise reported) amounted to $236,852.74.

His will was executed on August 21, 1930, and a codicil thereto was dated on July 6, 1934. Both were admitted to probate in this court on April 8, 1937. By reason of the execution of the codicil subsequent to August 31, 1930, the composite testamentary disposition is brought within the purview of section 18 of the Decedent Estate Law (Matter

of Greenberg, 141 Misc., 874, 880, 881, aff'd 236 App. Div., 733, aff'd 261 N. Y., 474), with the result, since the valid inception of the marriage is both demonstrated and admitted, that the widow is presumptively entitled (Matter of Green, 155 Misc., 641, 649, aff'd 246 App. Div., 583; Matter of Vogel, 251 App. Div., 741) to receive a testamentary benefit, at least partly in cash and the balance on a life trust, amounting to $118,426.37 (Decedent Estate Law, sec. 83, sub-div. 4; Decedent Estate Law, sec. 18, subdiv. 1a). The testamentary instruments, as probated gave her a general legacy of $2,000.00 and no more.

In view of the noted presumption which arises by reason of the demonstration of the valid marriage between the parties, the burden is imposed upon those contending for a contrary result to show some legal reason why the right of election accorded by section 18 of the Decedent Estate Law and asserted by the widow should not be effectuated. By reason of the composite demonstration it is presently immaterial whether this burden is one of proof or merely of going forward.

Since the right of election accorded to a surviving spouse by section 18 is absolute except as expressly conditioned by the terms of the section, the burden is imposed upon the petitioners who seek a determination that such right is not possessed by this widow to demonstrate the existence of some exception in the statute which has the effect of depriving her of its benefits. They point for this purpose to subdivision 9 of section 18, which reads: "9, The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other wheatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

Two matters are notable in the language employed in this section. The first is that the only variety of document which, under its language, is declared effective to bar the

elective right of the surviving spouse is one which is "subscribed and duly acknowledged." This requirement is prescribed whether such document be "an instrument" required for waiver of the right to elect against an identified will, or "an agreement" prescribed as prerequisite if all rights of the surviving spouse, in their entirety, are to be relinquished. In other words, this requirement of acknowledgment is expressly stipulated in respect of each of the three varieties of documents contemplated in the section, namely, the "instrument" of waiver against a single identified will the "agreement" of waiver against any will which is executed after the effective date of the statute, and the "agreement" of waiver or release executed prior to the effective date of the statute.

According to the terms of the subsection it is only a document of this particular description and presenting this prescribed characteristic which will be effective for the purpose of depriving the surviving spouse of the enlarged statutory rights of participation in the estate of her deceased husband accorded her by section 18. In view of the remedial nature of the legislation effected in this enactment as a whole and the liberal interpretation of its terms in favor of the enlarged rights of the survivor which has continuously been practiced and enjoined (Matter of Byrnes, 260 N. Y., 465, 474; Rubin *v.* Myrub Realty Co., Inc., 244 App. Div., 541, 544; Matter of Greenberg, 141 Misc., 874, 885-886, aff'd 236 App. Div., 733, aff'd 261 N. Y. 474, 479; Thompson *v.* Thompson, 163 Misc., 946, 950, aff'd 254 App. Div., 601; Matter of Moore, 165 Misc., 683, 690; Matter of Collins, 156 Misc., 783, 785; Matter of Brown, 153 Misc., 282, 287; Matter of Harris, 150 Misc., 758, 760, 761; Matter of Simeone, 141 Misc., 737, 746), it seems apparent that any document should be subject to strict scrutiny which is tendered in support of a contention that the relief made available for spouses in general may not be claimed by the particular spouse whose rights are in question.

The present document does not comply with the specification of the statute which is applicable in this regard, namely, that the rights of a surviving spouse may be foreclosed only by an "agreement" subscribed and duly "acknowledged," since this instrument is not acknowledged. The opponents

of the widow contend, however, that if the statute be interpreted as invalidating this instrument, it must be held to be in contravention of article 1, section 10, paragraph 1, of the United States Constitution, and therefore void. The inhibition thus raised is, of course, that "No state shall * * * pass any * * * Law impairing the obligation of contracts."

The question is accordingly presented as to whether this unilateral declaration granting for purposes of argument its validity for any purpose is a contract within the contemplation of the Federal Constitution.

In Louisiana *v.* Mayor of New Orleans (109 U. S., 285, 288), and again in Morley *v.* Lake Shore Railway Co. (146 U. S. 162, 170) The United States Supreme Court said: "The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence."

To this may be added the statement by the same tribunal in Edwards *v.* Kearzey (96 U. S., 595, 599-600): "A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done."

It is obvious from these statements that in constitutional issues the concept of a contract is precisely the same as in ordinary litigations. The two indispensable essentials are an agreement or "meeting of the minds" of the contracting parties and a consideration moving to the person against whom enforcement of the asserted agreement is sought. Without these two elements no contract can be demonstrated to exist and no constitutional question may arise.

"The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition" (Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, 288).

"No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the

promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (Wisconsin & Michigan Railroad *v.* Powers, 191 U. S., 379, 386).

The document here in question does not purport to constitute a contract or agreement. It is a declaration of purpose and intention by the prospective bride only. Not only is no promise made by her but no consideration is expressed or implied. It is closely analogous to those situations which have repeatedly been litigated and in which the uniform determination has been made that no contract was consummated, in which a state has announced a given policy, later reversed, upon which individuals have sought to predicate contract rights. Respecting such a situation Mr. Justice Holmes, writing for the unanimous court, said in Wisconsin & Michigan Railroad *v.* Powers (191 U. S. 379, 386) "the presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant."

Here there is no promise—merely a declaration of intention. There is also no consideration either recited or demonstrated. In attempted avoidance of this difficulty the petitioners urge that the decedent married the present widow and that marriage has been held to constitute a valid consideration. Granting both premises, there is no inference on the record that the marriage two days later was viewed by the parties as a consideration for the declaration. It is primary that nothing may be deemed a consideration which is not so considered by both parties (Walton Water Co. *v.* Village of Walton, 238 N. Y., 46, 51; Beck *v.* Sheldon, 259 N. Y., 208, 211; Edrington-Minot Corp'n *v.* Garsson, Inc., 219 App. Div., 65, 67). "The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough * * *. Promisor and promisee must have dealt with it as the inducement to the prom-

ise" (McGovern *v.* City of New York, 234 N. Y., 377, 389; Walton Water Co. *v.* Village of Walton, 238 N. Y., 46, 51).

Even had it been demonstrated in the present case that the parties considered the consummation of the marriage to be a consideration for the agreement by the bride-elect, of which there is not the slightest indication, this could not, on the showing of the record, supply the requisite consideration for an agreement by the widow, since it is obvious that the parties had already agreed to intermarry and it is elementary that an agreement to do an act which one is already obligated to perform, or actual performance thereof, does not supply an adequate consideration for a new agreement by the person in whose favor the obligation already exists (Carpenter *v.* Taylor, 164 N. Y., 171, 177; O'Meara Co. *v.* Nat. Park Bank, 239 N. Y., 386, 399; 269 Canal Street Corp'n *v.* Zurich General Accident & Liability Ins. Co., 226 App. Div., 516, 519, aff'd 252 N. Y., 603; Melnick *v.* Kukla, 228 App. Div., 321, 324).

It is obvious, therefore, that the document in question, not having been acknowledged, does not comply in this regard with the only variety of instrument which under subdivision 9 of section 18 of the Decedent Estate Law will be effective to bar the widow's right of election.

The infirmity of the document does not, however, terminate here. The subdivision expressly prescribes the particular variety of instrument which is requisite for a waiver of the rights of election of a surviving spouse against all wills or in situations in which it was executed prior to the effective date of the statute. In both such connections such instrument must be "an agreement." This term is a word of art possessing a well defined and thoroughly established meaning in the law not only of this state but of every other common-law jurisdiction.

An "agreement" is a mutual assent (Rohr *v.* Baker, 10 Pac., 627, 13 Or., 350; Johnes *v.* Williams, 40 S. W., 353, 367, 139 Mo., 1; Richardson *v.* Clements, 89 Pa., 503, 505; United States *v.* Richards, 149 Fed., 443, 451; Carter *v.* Prairie Oil & Gas Co., 160 Pac., 319, 322, 58 Okl., 365; Dixie Fire Ins. Co. *v.* Wallace, 156 S. W., 140, 141, 153 Ky., 677; Williams *v.* Diesel, 165 Pac., 187, 188, 65 Okl., 163) or com-

ing together in accord or meeting of the minds (Leonard *v.* Marshall, 82 Fed., 396, 399; United States *v.* Richards, 149 Fed., 443, 451; Southern Surety Co. *v.* Phillips, 24 S. W., 2d, 870, 872, 181 Ark., 14), of two or more parties (Jones *v.* Williams, 40 S. W., 353, 367, 139 Mo., 1; Arnold *v.* Scharbauer, 116 Fed., 492, 497; Richardson *v.* Clements, 89 Pa., 503, 505; Carter *v.* Prairie Oil & Gas Co., 160 Pac., 319, 322, 58 Okl., 365; Tucker *v.* Pete Sheeran Bro. & Co., 160 S. W., 176, 178, 155 Ky., 670; Williams *v.* Diesel, 165 Pac., 187, 188, 65 Okl., 163; Southern Surety Co. *v.* Phillips, 24 S. W., 2d, 870, 872, 181 Ark., 14), on a consideration (Arnold *v.* Scharbauer, 116 Fed., 492, 497). The term connotes a mutual obligation (Benedict *v.* Pineus, 191 N. Y., 377, 383, 384; Moran *v.* Standard Oil Co., 211 N. Y., 187, 197; Davis *v.* Frank, 102 Misc. 683, 684), and is synonymous with the word "contract" (Durham *v.* Taylor, 29 Ga., 176; Sage *v.* Wilcox, 6 Conn., 81, 84; Barnard *v.* Lancashire Ins. Co., 101 Fed. 36, 37; United States *v.* Edgar, 45 Fed. 44, 46; Michael *v.* Kennedy, 148 S. W., 983, 984, 166 Mo. App., 462; Douglass *v.* Williams Art Co., 85 S. E., 993, 143 Ga., 846; Moss *v.* Winston, 118 So., 739, 740, 218 Ala., 364). As is said in Bingham *v.* Insurance Co. of North America (43 N. W. 494, 495, 74 Wis., 498): "To constitute an agreement, the minds of both parties must meet. That means that one mind can not make an agreement alone; that both must understand the agreement alike and must assent to that agreement; or, to use the term the law uses in such case, the minds of the parties must meet upon the subject of the agreement" (see also White *v.* Kingston Motor Car Co., 69 Misc. 627, 628). Mutual assent and obligation are inherent in the legal conception of an agreement, wherefore purely unilateral action as in the giving of a quitclaim can never constitute an "Agreement" (Chamberlain *v.* Abrams, 79 Pac., 204, 205, 36 Wash., 587).

The present document does not purport to be even so much as a quitclaim. It is merely a unilateral statement of intention and is accordingly not an "agreement" within the well established connotation of the term.

Those seeking to profit at the expense of the widow contend, however, that when the Legislature twice employed this word of definite legal meaning it did not intend to use

it in the sense in which it is habitually employed and designed merely to require a unilateral waiver. As authority for this position they tender Matter of Moore (165 Misc., 683). The court is familiar with this decision and despite its high regard for its distinguished author, has already expressed its inability to concur in his view (Matter of Shapiro, 154 Misc., 55, 58).

That a waiver of the right to elect against a single identified will may be accomplished by a unilateral instrument is unquestionable because the Legislature has expressly so provided. In respect of a waiver against any will made either before or after the effective date of the statute, the Legislature has pointedly and with reiteration adopted a diverse provision phrased in language possessing a well established legal connotation, and this court does not feel itself justified in holding that these expressly and to its mind, deliberately chosen, diverse requirements are capable of being accorded a meaning identical with that aptly but differently described in respect of waiver of the right to elect against the provisions of an identified will.

As has hereinbefore been indicated the word "agreement" possesses a well defined meaning in the law, and it is an established principle of statutory construction that in such a situation its technical connotation must be accorded to it in the absence of unmistakable demonstration of a contrary intention (Perkins *v.* Smith, 116 N. Y., 441, 448; People, &c., *v.* Wainwright, 237 N. Y., 407, 412; People ex rel. Hunt *v.* Lane, 132 App. Div. 406, 407-408, aff'd 196 N. Y., 520), which is here absent.

In the opinion of the court, therefore, the document tendered for the purpose of defeating the elective rights of the widow is defective and invalid for that purpose, both by reason of the fact that it is not acknowledged and because it is not the type of document, namely "an agreement," which has been prescribed by the Legislature for the purpose.

In view of its inadequacy under the provisions of subdivision 9 of section 18 of the Decedent Estate Law and the fact that it does not constitute an enforcible contract or agreement at common law inhibiting the assertion of elective rights, its efficacy, if any, for the purpose of disinherit-

ing the widow must be predicated upon the equitable doctrines of waiver or estoppel.

To establish waiver, it must be shown that there was a deliberate, informed abandonment of known rights (Alsens American Cement Works *v.* Deghon Contracting Co., 222 N. Y., 34, 37; Draper *v.* Oswego County Fire Relief Ass'n, 190 N. Y., 12, 16; Ansorge *v.* Belfer, 248 N. Y., 145, 150; Matter of Feldhus, 165 Misc., 122, 123, aff'd 254 App. Div., 903, aff'd 280 N. Y.—20 N. E., 2d, 17; Matter of Heim, 166 Misc., 931, 937, aff'd 255 App. Div., 1007; Matter of Miller, 162 Misc., 563, 571, aff'd 252 App. Div., 872). Here there is no such demonstration. On the contrary no evidence has been introduced in support of the allegation, expressly denied by the widow, that at the time of its signature she had "knowledge of the nature, terms and effect" of the document. The petitioner has, therefore, failed to demonstrate a situation to which the equitable doctrine of waiver is applicable.

To constitute an estoppel against her, it must have been demonstrated that the testator altered his position in reliance on the document (Lawrence *v.* Brown, 5 N. Y., 394, 409; Mfrs. & Traders Bank *v.* Hozard, 30 N. Y., 226, 230; Continental Nat. Bank *v.* National Bank of Commonwealth, 50 N. Y., 575, 581; Blair *v.* Walt, 69 N. Y., 113, 116; Rothschild *v.* Title Guar. & Trust Co., 204 N. Y., 458, 464; Matter of Leverich, 135 Misc., 774, 778, aff'd on opinion of this court 234 App. Div., 625). Of any such situation the record contains not a scintilla of evidence.

The court therefore deems the document submitted in defeat of the rights of the widow wholly nugatory on grounds entirely different from those upon which its former decisions denying judgment on the pleadings to the petitioners were predicated (166 Misc., 636; 169 Misc., 498). It bows to the superior authority of the Appellate Division of this department in its determination (Matter of Rogers, 250 App. Div., 26, 28) that in dealings between husband and wife or prospective spouses "there is no presumption of inequality either way from these relations merely," although it must confess to some difficulty in reconciling this position with the statements of the Court of Appeals in such cases as Matter of Smith (95 N. Y., 516, 522), Pierce *v.*

Pierce (71 N. Y., 154, 148), Graham *v.* Graham (143 N. Y., 573, 580), Marx *v.* McGlynn (88 N. Y., 357, 371) and Matter of Putnam (257 N. Y., 140, 143). In any event, this portion of the rule of the case has now become immaterial in view of its further statement: "But when it appears prima facie that the pa ies have been dealing with each other under circumstances of inequality, then a presumption arises against the husband especially if the transaction has resulted in detriment to the wife."

Here the prospective wife, on the eve of her marriage, was induced to sign a document, not prepared by her, knowledge of the nature, terms and effect of which she denies, the effect of which is to deprive her, utterly without any intimation or semblance of consideration of rights of inheritance worth $116,426.37. If this demonstration is not a prima facie sufficient indication of inequality and overreaching on the part of the prospective husband, to require his estate to come forward with some explanation demonstrating that no advantage was taken by him of the relationship which the Court of Appeals has on at least two occasions held to be one of confidence and justified reliance (Pierce *v.* Pierce, 71 N. Y., 154, 158; Graham *v.* Graham, 143 N. Y., 573, 580) it would seem that the effect of subsection 9 of section 18 of the Decedent Estate Law, as interpreted, has made it possible for a designing spouse or prospective spouse to nullify the entire beneficent purpose of the enactment with virtual impunity.

The court can not believe this to be the law. On the contrary, it conceives the correct doctrine to be the "the courts regard with rigid scrutiny an ante-nuptial contract which deprives her (the wife) of any prospective interest in the estate of her intended husband, and especially is this required in a case where such relinquishment on her part is made without any provision for her support in case she survives him" (Graham *v.* Graham, 143 N. Y., 573, 580) and "that the courts require strict proof of fairness, when called upon to enforce an ante-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust and unreasonably disproportionate to the means of the husband. *The rule undoubtedly is that in such a case every presumption is*

against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement" (Pierce *v.* Pierce, 71 N. Y. 154, 158). Italics not in original.

For the reasons stated the court determines that the present widow is entitled to assert and has validly claimed her right of election to take her intestate share in contravention of the terms of the will pursuant to the provisions of section 18 of the Decedent Estate Law.

Enter decree on notice in conformity herewith.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. ~~968~~. 51

IN THE MATTER

—of—

The Application of IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, THOMAS F. McGLONE, ROSE McGLONE MEREDITH, EDWARD McGLONE and ROBERT McGLONE, infants, by RALPH L. KASKELL, JR., Special Guardian,

Appellants,

—against—

CHASE L. DAY, as Executor under the Last Will and Testament of HELENA DAY McGLONE, Deceased,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS.

PHILIP ZIERLER,
Counsel for Appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Rose McGlone Meredith and Thomas F. McGlone.

RALPH L. KASKELL, JR.,
Special Guardian for Edward McGlone and Robert McGlone, infants.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 968.

IN THE MATTER OF THE APPLICATION
of
IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, for a determination of the right of Helena Day McGlone to elect under Section 18 of the Decedent Estate Law to take against the provisions of said Last Will and Testament and Codicil thereto of John J. McGlone, deceased.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, THOMAS F. McGLONE, ROSE McGLONE MEREDITH, EDWARD McGLONE and ROBERT McGLONE, infants, by RALPH L. KASKELL, JR., Special Guardian,
Appellants,
—against—
CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, deceased,
Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS.

On February 2nd, 1922, Helena Day Snyder and John J. McGlone, both citizens of the United States, were in London.

On that day she executed and delivered to him an instrument, in script, on a letterhead of the Savoy Hotel, reading as follows:

"The Beverleys,
Osterley, Middlesex, England.
February 2—1922.
Savoy Hotel,
London
WC 2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.

Helena Day Snyder"

On February 4th, 1922 they were married. This was his first and her third marital venture. The authenticated record of the marriage discloses that he was forty-seven years old, and that she represented herself to be forty-five years of age. It appears from the admission in the pleadings that her real age at the time was sixty-two. She had no children by her prior marriages, nor was there any issue from this one.

Mrs. Snyder's signature to the aforementioned document was conceded to be valid. The delivery thereof to Mr. McGlone at the time of its execution was likewise admitted.

This document contains internal evidence that Mrs. Snyder was possessed of an independent fortune and that she understandingly and voluntarily renounced all interest in the estate of her prospective husband. If the recitals therein were untrue, proof thereof—no doubt readily available to her—would have been offered at the trial, but she offered no

evidence whatever. These admissions must therefore be deemed to be true.

"These facts", said the Appellate Division, "also carry the further implication that the instrument was signed to induce the marriage. * * * The February 2, 1922 instrument had a valid consideration. The marriage constituted that consideration. It has long been recognized as 'amongst the highest considerations known to the law'" (258 App. Div. 596, 17 N. Y. Supp (2d) 316, at 321 and 323).

Agreements such as the one in the case at bar have long been enforced by the Courts of the State of New York.

In *Pierce* v. *Pierce*, 71 N. Y. 154, the Court said at page 157:

> "Antenuptial contracts whereby the future wife releases her claim to her right of dower, and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition they will be enforced by the courts."

Tiffany in his work on Persons and Domestic Relations says at page 151:

> "There is no rule of law nor principle of public policy which prevents husband and wife from thus fixing, by an agreement before marriage, the rights which they shall have in each other's property, and relinquishing the interests which they would otherwise acquire therein by virtue of the marriage. Thus, they may relinquish their distributive shares in each other's estates, or the wife may bar her dower or the husband his curtesy."

At the time the agreement in the case at bar was made there were but two statutory provisions in effect applicable thereto—Section 31, subdivision 3 of the Personal Property Law, and Section 53 of the Domestic Relations Law. Section 31, subdivision 3 of the Personal Property Law, provides that every agreement, promise or undertaking made in consideration of marriage, except mutual promises to marry, should be in writing and subscribed by the party to be

charged therewith. Section 53 of the Domestic Relations Law provides that a contract made between persons in contemplation of marriage remains in full force after the marriage takes place.

There was no requirement of an acknowledgment. The sole requirement was that the instrument be in writing and subscribed by the person to be charged therewith.

The agreement in the case at bar therefore complied with the law in effect at the time it was made.

The language of the agreement is unambiguous. It clearly appears therefrom that Mrs. Snyder intended to relinquish every right she might thereafter acquire in the estate of her prospective husband. The nature of such right or interest is immaterial since she renounced all right, title and interest, legal and otherwise, in any estate, real or personal, of which Mr. McGlone might die seized.

About eight years after this agreement was made the Legislature enacted Section 18 of the Decedent Estate Law (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930). By this section it was provided that where a testator dies after August 31st, 1930, and leaves a Will thereafter executed, and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section. Subdivision 9 of this section is as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

On August 21st, 1930, Mr. McGlone made a Will in which he referred to the waiver by his wife of all interest in his estate. He nevertheless provided that $2,000.00 be given to her or used to purchase a token for her. On July 6th, 1934, he executed a Codicil which did not disturb this provision for his wife. Under the terms of the Will and Codicil he left his estate principally to his sister, brothers and nephews.

Mr. McGlone died on February 22nd, 1937, leaving him surviving his widow, Helena Day McGlone, a sister, two brothers and three nephews. On September 23rd, 1937, Mrs. McGlone executed and filed a notice of election pursuant to Section 18 of the Decedent Estate Law to take against the Will and Codicil. Mrs. McGlone died after the trial and entry of the original decree and the proceeding thereafter became and now is a contest between the sister, brothers and nephews of Mr. McGlone and the next of kin of Mrs. McGlone.

The appellee contends that the agreement made by Mrs. McGlone did not bar her from claiming an interest in Mr. McGlone's estate because it was not acknowledged as required by subdivision 9, Section 18 of the Decedent Estate Law.

The appellants contend that under the instrument of February 2nd, 1922, which was acted upon by Mr. McGlone at the time of the marriage on February 4th, 1922, he acquired a vested contract right to bar Mrs. McGlone from claiming any interest in his estate; that this agreement was valid under the then existing statutes which did not require an acknowledgment; and that the subsequent enactment therefore violated his constitutional rights. (United States Constitution, Article I, Section 10; and the Fourteenth Amendment, Section 1.)

The appellants' contention was sustained by the unanimous decision of the Appellate Division (258 App. Div. 596, 17 N. Y. Supp. (2d) 316). At pages 322 and 323 (New York Supplement) that Court said:

> "This necessitates determining whether the above last sentence is constitutional. If it is invalid the lack of an acknowledgment is not fatal to the instru-

ment. When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (S. 53, Domestic Relations Law; S. 31, subdiv. 3, Personal Property Law), which did not require an acknowledgment; and an antenuptial agreement made in a foreign country is enforceable in this State. *Læmye* v. *Sirker*, 226 App. Div. 159, 161, 235 N. Y. S. 273; *Ross* v. *Ross*, No. 1, 233 App. Div. 626, 253 N. Y. S. 871.

"This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (added by Laws of 1929, chap. 229, and amended by Laws of 1930, chap. 174). The subsequent enactment, therefore, violated the testator's constitutional rights. U. S. C. A. Const., Art. 1, S. 10; N. Y. State Const., Art. 1, S. 6. By the former a State is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid. *Walker* v. *Whitehead*, 83 U. S. 314, 21 L. Ed. 357; *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Tennessee ex rel. Bloomstein* v. *Sneed*, 96 U. S. 69, 24 L. Ed. 610; *Louisiana ex rel. Ranger* v. *New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *McGahey* v. *Virginia*, 135 U. S. 662, 685, 10 S. Ct. 972, 34 L. Ed. 304; *Coolidge* v. *Long*, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562; *Holmes* v. *Holmes*, 4 Barb. 295, 303; *Ralph* v. *Cronk*, 266 N. Y. 428, 195 N. E. 139; *Matter of Goldbergs' Estate*, 275 N. Y. 186, 189, 9 N. E. (2d) 829.

"The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words 'so executed'. It is universally recognized that a statute may be constitutional in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary events. 'The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.' *People ex rel. Alpha*

Portland Cement Co. v. *Knapp*, 230 N. Y. 48, 54, 60, 129 N. E. 202, 207, per Cardozo, *J.*; *People* v. *Mancuso*, 255 N. Y. 463, 472, 473, 175 N. E. 177, 76 A. L. R. 514. The deletion of the words 'so executed' does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting than was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

"This view has the further effect of recognizing that the sentence with the deletion of the words 'so executed' becomes declaratory, in substance, of the pre-existing statute law (S. 53, Domestic Relations Law; S. 31, subdiv. 3, Personal Property Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid."

The Court of Appeals expressed no disagreement with the opinion of the Appellate Division, except its conclusion that the statute aforementioned is repugnant to the Constitution of the United States and invaded the contract rights which vested in Mr. McGlone prior to its enactment. (*In re McGlone's Will*, 284 N. Y. 527 at 533.)

The appellee also contends, as a bar to the jurisdiction of this Court, that the document executed by Mrs. McGlone is not a contract, and that even if it is a contract, it is not effective as a waiver of her claim to an interest in Mr. McGlone's estate. The Appellate Division, however, decided that it is a contract, and the Court of Appeals did not disagree with this conclusion. Furthermore, this Court has the right to determine for itself whether it is a contract, its construction and effect, and whether its obligations have been impaired by the subsequent legislative enactment as enforced by the State Court.

In *Appleby* v. *City of New York*, 271 U. S. 364, this Court said at pages 379, 380:

> "The plaintiffs in their writ of error charge that the judgment of the Supreme Court of New York, as affirmed by the Court of Appeals, has intrepreted and enforced the Acts of 1857 and 1871 in such a way as to impair the obligation of the contract in their deeds.
>
> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the State Court? These questions we must answer independently of the conclusion of that Court. Of course we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guarantee of the Federal Constitution as to the inviolability of contracts by State legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turn on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State and City to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a State question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the State Court then and since made; but we must give our own judgment derived from such sources and not accept the present conclusion of the State Court without inquiry."

Again, in *Larson* v. *South Dakota*, 278 U. S. 429, this Court said at page 433:

> "The petitioner relies on the contract clause of the Federal Constitution, and is not prevented from invoking from this Court an independent construction of what the contract means, and whether by a proper

> construction the building of a brid[illegible]airs its obligation. * * *
>
> "We must therefore treat the questi[illegible]n as an open one and determine as an independent matter what the parties must be held to have had in mind in the use of the term 'exclusive lease'."

And in the case of *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, Justice Roberts, delivering the opinion of the Court, said at page 98:

> "Where the State court does decide against a petitioner or appellant upon an independent State ground, but deeming the Federal question to be before it, actually entertains and decides that question adversely to the Federal right asserted, this Court has jurisdiction to review the judgment, if, as here, it is a final judgment. We cannot refuse jurisdiction because the State court might have based its decision, consistently with the record, upon an independent and adequate non Federal ground. And since the amendment of the Judiciary Act of 1789 by the Act of February 5, 1867, it has always been held this Court may examine the opinion of the State court to ascertain whether a Federal question was raised and decided and whether the court rested its judgment on an adequate non Federal ground."

and at page 100:

> "As in most cases brought to this Court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it. * * *
>
> "On such a question, one primarily of State law, we accord respectful consideration and great weight to the view of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an ap-

praisal of the statutes of the State and the decisions of its courts."

The case at bar therefore presents for this Court's determination the question of the right of the Legislature of the State of New York to render unenforceable for want of an acknowledgment, a contract made before the effective date of Section 18 of the Decedent Estate Law, whereby a spouse waived all rights in the estate of the other spouse.

Mr. McGlone left an estate appraised for tax purposes, at $236,852.74. As a result of the decision of the Court of Appeals, one-half of this estate will be taken from Mr. McGlone's sister, brothers and nephews and turned over to the next of kin of Mrs. McGlone, notwithstanding the agreement on the part of Mrs. McGlone waiving all interest in her husband's estate. The appellants feel that this Court should pass upon the questions involved in this appeal before a result so unjust becomes absolute.

The decision of the Court of Appeals has not only rendered unenforceable the agreement in the case at bar, but has also nullified all unacknowledged agreements of every type and kind, made before the effective date of Section 18 of the Decedent Estate Law, by the terms of which a spouse or prospective spouse waived or released all rights in the estate of the other spouse.

By this decision the Court of Appeals has also made it impossible for any spouse or prospective spouse to hereafter make a binding contract in contemplation of marriage or otherwise, waiving all interest in any estate left by the other spouse, since under this decision, the Legislature can render such an agreement wholly ineffective by a subsequent enactment making some change in the rights of inheritance and recognizing a waiver only if executed in a manner not theretofore required.

The appellants therefore submit that this appeal raises questions of a substantial nature, directly involving the constitutionality of a statute of the State of New York, the validity of which has been upheld by the highest court of

that State, and that this Court has jurisdiction of this appeal.

Respectfully submitted,

PHILIP ZIERLER,
Counsel for Appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Rose McGlone Meredith and Thomas F. McGlone.

RALPH L. KASKELL, JR.,
Special Guardian for Edward McGlone and Robert McGlone, infants.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 51.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, *et al.*,

Appellants,

—vs.—

CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK.

BRIEF OF APPELLANTS IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS OF THE ESTATE OF JOHN J. McGLONE, DECEASED, THOMAS F. McGLONE AND ROSE McGLONE MEREDITH.

PHILIP ZIERLER, ESQ.,
Counsel for Appellants,
Irving Trust Company and Thomas
F. McGlone, Jr., as Executors, etc.,
Rose McGlone Meredith and Thomas F. McGlone.

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vs.

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I.

THE OPINIONS OF THE COURT BELOW.

The opinion in the Surrogate's Court is reported in 171 Misc. 612, 13 N. Y. S. (2d) 76 (R., 23).

The opinion in the Appellate Division is reported in 258 App. Div. 596, 17 N. Y. S. (2d) 316 (R., 42).

The opinion in the Court of Appeals is reported in 284 N. Y. 527, 32 N. E. (2d) 539 (R., 49).

II.

JURISDICTION.

1. The date of the final decree to be reviewed is January 24th, 1941 (R., 55).

2. The jurisdiction of this Court is invoked by reason of the rulings of the Court of Appeals: (a) that the provisions of Sub. 9, Sec. 18 of the Decedent Estate Law (Chap. 229, Sec. 4, Laws of 1929, as amended by Chap. 174, Sec. 1, Laws of 1930), are not in conflict with and violation of Section 10, Article I of the Constitution of the United States, and Section 1 of the Fourteenth Amendment thereof (R., 52, 53); (b) that the testator, John J. McGlone, did not acquire, by the instrument executed in 1922 in contemplation of marriage, contractual rights protected by the Constitution of the United States, which have been invaded by Sec. 18, Sub. 9 of the Decedent Estate Law (R., 52); (c) that an agreement made before the effective date of the new statute is not enforceable unless it was executed with the formalities provided therein (R., 53).

3. The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States are Sections 344 (a) and 350, Title 28 of the U. S. Code.

4. The cases which sustain the jurisdiction of the Supreme Court of the United States are *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 258; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478; *Smith* v. *Cahoon*, 283 U. S. 553; *Vero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285; *Hartford Steam Boiler Co.* v. *Harrison, Insurance Commissioner*, 301 U. S. 459; *American Toll Bridge Co.* v. *Railroad Comm.*, 307 U. S. 486; *Curry* v. *McCanless*, 307 U. S. 357; *Indiana, ex rel Anderson* v. *Brand*, 303 U. S. 95.

III.

STATEMENT OF THE CASE.

On February 2, 1922 Helena Day Snyder and John J. McGlone, both citizens of the United States, were in London. On that day she executed and delivered to him an instrument in script, on a letterhead of the Savoy Hotel, reading as follows:

> "The Beverleys,
> Osterley, Middlesex, England
> February 2—1922.
>
> Savoy Hotel,
> London
> WC 2
>
> I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.
>
> Helena Day Snyder"

(R., 16A, 17).

They were married on February 4, 1922 (R., 10). This was his first and her third marital venture (R., 10). The authenticated record of the marriage discloses that he was forty-seven years old, and that she represented her age to be forty-five years (R., 22A). It appears from the admissions in the pleadings that her real age at the time was sixty-two (R., 10, 17). She had no children by her prior marriages, nor was there any issue from this one (R., 10).

Her signature on the aforementioned document was conceded to be valid. The delivery thereof to Mr. McGlone at the time of its execution was admitted (R., 17). The document contains internal evidence that Mrs. Snyder possessed an independent fortune and that she understandingly and voluntarily renounced all interest in the estate of her prospective husband (R., 16A).

On August 21, 1930 Mr. McGlone made his Last Will and Testament (R., 14). This was prior to the effective date of Section 18 of the Decedent Estate Law.

The third paragraph of the Will reads as follows:

> "THIRD: My dear wife, HELENA DAY McGLONE, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character" (R., 13).

On July 6, 1934 (after the effective date of Section 18 of the Decedent Estate Law) Mr. McGlone executed a Codicil to the Last Will and Testament (R., 15, 16). This Codicil did not disturb the foregoing provision of the Will.

Mr. McGlone died on February 22, 1937. He left him surviving his widow, Helena Day McGlone, a sister, Rose McGlone Meredith, two brothers, Thomas F. McGlone and Ignatius V. McGlone, and three nephews, Thomas F. McGlone, Jr., Edward McGlone and Robert McGlone, the last two then being infants over the age of fourteen years (R., 9). His said Last Will and Testament and Codicil thereto were admitted to probate on April 8, 1937 on which date Letters Testamentary were issued to appellants, Irving Trust Company and Thomas F. McGlone, Jr. (R., 9).

On September 23, 1937 Mrs. McGlone served a notice of election to take her share of the estate as in intestacy pursuant to the provisions of Section 18 of the Decedent Estate Law. The executors then commenced this proceeding, pursuant to Section 145a of the Surrogate's Court Act, to determine the right of the widow to so elect. The infants, Robert McGlone and Edward McGlone, by their Special Guardian, and said Ignatius V. McGlone, Thomas F. McGlone and Rose McGlone Meredith filed answers consenting to a decree as prayed for in the executors' petition (R., 18, 19). Mrs. McGlone served an answer, which was amended by stipulation (R., 17). The answer did not contain any affirmative defense. A motion for judgment on the pleadings was made by all parties (Papers on Appeal, *In re McGlone's Will*, 256 App. Div. 1074, 11 N. Y. Supp. (2d) 3). This motion was denied by the Surrogate upon the ground that a presumption of fraud flows from the mere relationship of the parties and that it was necessary for the petitioners to plead and prove as part of their *prima facie* case that the agreement was not induced by fraud or inequitable conduct. The order denying the motion for judgment on the pleadings was affirmed by the Appellate Division, but that Court reversed the Surrogate on the law of the case, holding:

> "In the opinion of this court no presumption exists by reason of the relation existing between the parties, at the time the paper writing was made and delivered. (*Matter of Rogers*, 250 App. Div. 26.) The burden of pleading inequality, fraud or over-reaching is upon the widow."

Mrs. McGlone did not amend her answer.

The case was tried on May 25, 1939. In presenting their *prima facie* case petitioners relied upon the admissions in the pleadings and three documents which were received in evidence without objection. The first of these was the stipulation dated September 14, 1938, by which Mrs. McGlone admitted the delivery to Mr. McGlone of the paper writing above referred to at the time of its execution, and amended

her answer accordingly (R., 17, 19). The second was the aforementioned agreement signed by Mrs. McGlone, then Helena Day Snyder (R., 16A, 20). The third was the authenticated record of the marriage (R., 20, 22A). Mrs. McGlone offered no proof whatever. The Surrogate decided that Mrs. McGlone had not waived or released her right to elect under Section 18 of the Decedent Estate Law, and had effectively exercised such right of election.

Mrs. McGlone died after the trial and entry of the original decree, and the proceeding thereafter became a contest between the brothers, sister and nephews of Mr. McGlone, and the next of kin of Mrs. McGlone (R., 42).

The Appellate Division unanimously reversed on the law and the facts, and a decree was made by the Surrogate on March 15, 1940 as prayed for in the executors' petition (R., 36). The Appellate Division found and held that the agreement was made by Mrs. McGlone voluntarily, understandingly and under circumstances which were free from inequality and unfairness (R., 44, 45); that it was made to induce the marriage (R., 45); that the marriage constituted the consideration (R., 48); that the instrument was valid under the statutes in existence at the time it was made, which did not require an acknowledgment (R., 46); that when said instrument was executed on February 2, 1922 there vested under it in the testator certain contract rights; and that by prescribing a form of execution more exacting than that required by pre-existing statutes, Sec. 18, Sub. 9 of the Decedent Estate Law, violated previously vested rights under agreements theretofore made, whose form complied with the earlier statutes (R., 47, 48).

Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, then appealed to the Court of Appeals. That court reversed the order of the Appellate Division and decree of the Surrogate entered thereon, and confirmed the original decree of the Surrogate (R., 54). A final decree, on the remittitur of the Court of Appeals, was thereupon entered in the Surrogate's Court on January 24, 1941 (R., 55). The Court of Appeals did not

disagree with the findings or opinion of the Appellate Division, except its conclusion that the statute is repugnant to the Constitution of the United States, and invaded contract rights which vested in the testator prior to its enactment.

On March 27, 1941 the Chief Judge of the Court of Appeals made an order allowing an appeal to the Supreme Court of the United States. The appellee moved to dismiss the appeal. On May 12, 1941 an order was made noting probable jurisdiction.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in holding

(a) that the provisions of Sub. 9, Sec. 18 of the Decedent Estate Law (Chap. 229, Sec. 4, Laws of 1929, as amended by Chap. 174, Sec. 1, Laws of 1930) are not in conflict with and violation of Section 10, Article 1 of the Constitution of the United States, and Section 1 of the Fourteenth Amendment thereof;

(b) that the decedent John J. McGlone did not acquire, by the instrument executed by Helena Day McGlone (then Helena Day Snyder), on February 2, 1922, contractual rights, protected by the Constitution of the United States, which have been invaded by Sub. 9, Sec. 18 of the Decedent Estate Law;

(c) that the contractual rights acquired by the testator John J. McGlone under said instrument dated February 2, 1922 did not include the right to exclude his wife, Helena Day McGlone, from any share in his estate;

(d) that the instrument dated February 2, 1922 executed by Helena Day McGlone may not be given effect as a waiver of a right to succeed to property of her husband which the Legislature might thereafter create;

(e) that an agreement in contemplation of marriage within the meaning of Sec. 53 of the Domestic Relations Law, made before the effective date of Sec. 18, Sub. 9 of the Decedent Estate Law, and executed in a manner which satisfies the requirements of Sec. 31 of the Personal Property Law, whereby an intended wife waived or released all rights and interest in the estate of her prospective husband, is unenforceable if not acknowledged as provided by Sec. 18, Sub. 9 of the Decedent Estate Law; and

(f) that the facts in the case did not give rise to an estoppel or other equitable ground for denying to Helena Day McGlone her statutory right to elect as provided in Sec. 18 of the Decedent Estate Law.

V.

ARGUMENT.

Summary of Argument.

Point A: The agreement made on February 2, 1922 was valid under the laws in force at the time it was made, which did not require an acknowledgment. It is in writing and was subscribed by Mrs. McGlone. By its terms Mrs. McGlone renounced all right, title and interest she might legally or otherwise have in any real or personal property of which her prospective husband might die seized. It was made eight years before the enactment of Sec. 18 of the Decedent Estate Law, by which a surviving spouse is given a right of election to take his or her share of the estate of the other spouse as in intestacy. Subdivision 9 (as amended by Chap. 174, Sec. 1, Laws of 1939) provides that an agreement "so executed" made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section. The words "so executed" incorporate by reference the requirement contained in the preceding sentence that the subscription shall be "duly acknowledged".

The purpose of this provision was to save agreements previously executed. However, the language went beyond this purpose and prescribed a form of execution more exacting than that required by pre-existing statutes (Sub. 3, Sec. 31, Personal Property Law, Sec. 53, Domestic Relations Law), through which contract rights vested in the testator under the instrument of February 2, 1922 which were acted upon by him at the time of the marriage on February 4, 1922. The subsequent enactment consequently violated the testator's constitutional rights.

Point B: Under the agreement herein Mr. McGlone acquired a vested right to exclude Mrs. McGlone from claiming any interest in his estate. There is no rule of law or principle of public policy which prevents husband and wife from fixing by agreement, before marriage the rights which they shall have in each other's property, and relinquishing the interests which they would otherwise acquire by virtue of the marriage. Such a contract is as much within the protection of the fundamental law as any other. The agreement in the case at bar was not limited to a waiver of dower, nor was its efficacy contingent upon Mr. McGlone dying intestate. Under its terms Mrs. McGlone relinquished all right, title and interest she would have acquired through marriage in any real or personal property of which her prospective husband might die seized. The nature of the right she would have acquired, but for the agreement, is immaterial. It might be diminished or enlarged by subsequent legislation without affecting her rights in any way, because she had released all interest in his estate. The Legislature could not, without constitutional infringement, give her any rights in derogation of the vested contract rights which the testator and his estate had already acquired. The release of a future right is equivalent to a covenant not to enforce the right whenever it arises. The right to enforce performance of this covenant was impaired and taken without due process of law.

Point C: The agreement herein complies with the provisions of Sub. 9, Sec. 18 of the Decedent Estate Law, so far as the same is valid. It is an agreement releasing or waiving all rights in the estate of the other spouse, within the meaning of this statute. The history of the section shows that any type of agreement is proper. There is no requirement that the agreement be "mutual" or "bi-lateral". The statute does not require the complete terms of the arrangements between the parties to be set forth, nor that a consideration be stated. Essentially the term "agreement" as used in this section, means an agreement on the part of the surviving spouse surrendering his or her right, and the signature of such spouse alone is sufficient.

Point D: The instrument of February 2, 1922 was made to induce the marriage. It had a valid consideration. The marriage constituted that consideration. It recites the coming marriage on February 4, 1922, and was made in contemplation thereof. The form of the agreement indicates that the parties believed there was a consideration and intended to affect their legal relations. The natural consequence of Mrs. McGlone's promise was to induce the marriage. Until the marriage took place she was not bound. Where marriage is the consideration it need not be recited in the agreement. The latter will be enforceable so long as the marriage is actually solemnized. Marriage is a consideration of the highest value.

Point E: Whether the instrument of February 2, 1922 be deemed an agreement, a grant, release or even a gift, the rights which vested thereunder in the testator and are within the constitutional guaranty against the impairment of the obligations of contract and the taking of property without due process of law. Upon the consummation of the marriage Mr. McGlone acquired the right to prevent his wife from claiming any part of his estate—this was an immediate and fixed right of future enjoyment; and Mrs. McGlone became obligated to perform her promise not to assert any right to

his estate. This was a contract concerning property and conferring rights which may be asserted in a court of justice. Any change in the law which materially impaired the means of legally enforcing the agreement, necessarily altered its obligation in violation of the Constitution.

Point F: The agreement herein was an express, deliberate and informed waiver of Mrs. McGlone's rights. Mr. McGlone twice altered his position relying thereon. First, by marrying her, and second, by the execution of a codicil to his Will, after the effective date of the new statute. It is unfair and inequitable to permit Mrs. McGlone, after his death, to repudiate the arrangement into which she voluntarily entered. She is estopped from asserting any claim to his estate.

Point G: The appellants made out a *prima facie* case upon the trial, and since Mrs. McGlone failed to present any proof, they were entitled to judgment. It is the law of the case that no presumption exists by reason of the relation of the parties, and that the burden of pleading fraud, inequality or over-reaching is upon Mrs. McGlone. She did not so plead, and there was no such issue at the trial. Mrs. McGlone offered no evidence indicating that she dealt with her prospective husband under circumstances of inequality. It was therefore unnecessary for appellants to prove, as part of their *prima facie* case, that she was not coerced or defrauded. In the absence of fraud, a person signing an agreement such as this is charged with knowledge of its character and contents. The unchallenged proof that it was genuine was sufficient to establish *prima facie* that it was binding upon Mrs. McGlone.

POINT A

BY PRESCRIBING A FORM OF EXECUTION MORE EXACTING THAN THAT REQUIRED BY PRE-EXISTING STATUTES, SUBDIVISION 9, SECTION 18 OF THE DECEDENT ESTATE LAW, VIOLATED VESTED CONTRACT RIGHTS UNDER AGREEMENTS MADE BEFORE ITS EFFECTIVE DATE WHOSE FORM COMPLIED WITH THE EARLIER STATUTES.

Although the law fixes the rights of a husband and wife in each other's property, persons possessing requisite legal capacity, may, by an antenuptial agreement, exclude the operation of law, and determine for themselves what rights they will have in each other's property, during the marriage and after its termination by death. The rights of either spouse in the estate of the other under the statutes of descent and distribution may be released or barred. This is the prevailing judicial sentiment, as the following authorities will abundantly show

Appleby v. *Appleby*, 100 Minn. 408 at 419;
Bibelhausen v. *Bibelhausen*, 159 Wisc. 365 at 372;
McNutt v. *McNutt*, 116 Ind. 545, 549;
Richard v. *Detroit Trust Co.*, 269 Mich. 411;
Vaill, et al. v. *Maurer*, 25 Md. 532;
Moore v. *Harrison*, 26 Ind. App. 408 at 411;
In re Estate of Thorman, 162 Iowa 316;
Burns v. *Spiker*, 109 Kan. 22;
13 Ruling Case Law, pp. 1012, 1013;
Tiffany on Persons and Domestic Relations, p. 151.

In *Appleby* v. *Appleby*, 100 Minn. 408, the Court said at 419:

> "The property rights of each party may be thus definitely fixed and determined in advance, each being left to control and manage his or her separate property as if unmarried; and this, notwithstanding the statutory provisions fixing the relative rights of each in and to the property of the other. The statutes upon

> that subject are superseded by the contract which becomes absolute upon the consummation of the contemplated marriage."

This has long been the law in the State of New York. At the time the agreement in the case at bar was made, a contract between a man and woman, in contemplation of marriage, by which either one relinquished all rights in the estate of the other, was fully recognized and enforced by the Courts of this state; nor was there any law, statutory or otherwise, which required such a contract to be acknowledged.

> *Pierce* v. *Pierce*, 71 N. Y. 154;
> *Young* v. *Hicks*, 92 N. Y. 235 at 238;
> *Johnston* v. *Spicer*, 107 N. Y. 185, 191.

In *Pierce* v. *Pierce*, 71 N. Y. 154, the Court of Appeals said:

> "Antenuptial contracts whereby the future wife releases her claim to her right of dower, and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition they will be enforced by the courts."

And in *Johnston* v. *Spicer*, 107 N. Y. 185 at 191, the same Court said:

> "No especial formality is requisite in such instruments."

Section 31 of the Personal Property Law then provided and still provides that every agreement in consideration of marriage, except mutual promises to marry, must be in writing and subscribed by the person to be charged therewith, and Section 53 of the Domestic Relations Law then provided and still provides that a contract made between persons in contemplation of marriage remains in full force after the

marriage takes place. These were the only statutory provisions applicable to the agreement in the case at bar, in effect when it was made. The agreement is in writing and subscribed by the person sought to be charged therewith, but was not acknowledged. Its language is not ambiguous. It clearly evidences Mrs. McGlone's intention to relinquish every right and interest in Mr. McGlone's estate.

The agreement was executed and delivered eight years before the effective date of Section 18 of the Decedent Estate Law. This statute provides that when a person dies after August 31, 1930, and leaves a Will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy. Subdivision 9 of this statute, as originally enacted (Chap. 229, Sec. 4, Laws of 1929), formerly read as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement of settlement so executed, made before or after marriage."

The following year Subdivision 9 was amended (Chap. 174, Sec. 1, Laws of 1930) by the elimination of the words "of settlement", so that the form of the instrument remained by statutory direction merely an agreement, and by the addition of a new sentence at the end of the subdivision. Subdivision 9 as amended reads as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agree-

ment so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

The purpose of the amendment was explained by Surrogate Foley in *In re Moore's Estate*, 165 Misc. 683, affirmed 254 App. Div. 856, affirmed 280 N. Y. 733. At pages 687 and 688 the Surrogate said:

"The purpose of this new sentence was to give legal recognition to an agreement by which a husband or wife had waived all rights in the estate of the other spouse in an instrument executed before September 1, 1930. The change of the form of the subdivision from an 'agreement of settlement' to a mere 'agreement' of any kind is significant in the solution of the controversy here. It is illuminative of the intent of the Decedent Estate Commission which recommended it, and of the Legislature which enacted it, to authorize a form of instrument other than an antenuptial or postnuptial agreement of settlement. The footnote printed in the legislative bill indicates the broadened scope of the document to be employed. The waiver might be embodied in a trust deed executed by the husband or wife for the benefit of the other, or in a separation agreement, or in any other form of agreement. Cases were visualized where either spouse might before or after marriage waive his or her rights to take against any will without any consideration. Either might possess an independent fortune. In such case, the husband might be entirely willing to permit the wife to dispose of her own property as she pleased. The wife might be willing to do likewise. Joint execution of the agreement was never contemplated. The husband might be willing to waive his right to take against any will of his wife. A single instrument executed by him alone would be sufficient. Her right to take against any will of his might thus be preserved. In other words both could arrange for the disposition of the property of either by a joint agreement, or by an antenuptial agreement, or by a separation agreement, or by a trust deed or by an agreement in the form of a release, such as is presented in the

> pending proceeding, signed by one of the spouses only. The word used in the subdivision comprehends and includes many other forms of agreements unnecessary to specify here. Essentially the term applies to an agreement on the part of the party surrendering the right and his or her signature only is sufficient."

Although the purpose of the sentence was to save agreements previously executed, it is obvious that the language went beyond this purpose and prescribed a form of execution more exacting than that required by pre-existing statutes, and consequently violated vested rights under agreements, previously made, whose form complied with the earlier statutes. The words "so executed" should be deleted from the new sentence. Such deletion would not alter the legislative purpose to save agreements previously executed. With such deletion the sentence would become declaratory of the pre-existing statute law (Sec. 31, Sub. 3, Personal Property Law, Sec. 53, Domestic Relations Law) through which contract rights vested in the testator under the instrument of February 2, 1922, which were acted upon at the time of the marriage on February 4, 1922.

The Court of Appeals held that since the Legislature had the power to create for the benefit of a spouse a new right of succession to property, it was also empowered to provide that a spouse could not waive the benefit of that right except by an instrument executed with the formalities set forth in the statute. The Legislature undoubtedly had the power to change the rights of descent and distribution, but it could not take away or invade vested rights under existing contracts which were executed with the formalities required by the statutes in force when the contract was made.

It is the law in force at the time a transaction is consummated and made effectual that must be looked to as determining its validity and effect.

> *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609 at 623.

In *Ralph* v. *Crouk*, 266 N. Y. 428, the Court of Appeals held that a statute declaring void every agreement which is not to be completely performed before the end of a lifetime, or which is a contract to bequeath property or make a testamentary provision, unless such agreement or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith or by his lawful agent, is inapplicable to contracts existing at the date of its passage.

In *Matter of Goldberg*, 275 N. Y. 186, the same Court said at page 189:

> "This agreement to marry and to make a Will was not in writing. It rests entirely upon oral testimony. If it were a valid agreement in view of section 31, subdivision 3, of the Personal Property Law (Cons. Laws, ch. 41), binding upon both parties, a subsequent statute passed almost two years later making such an agreement void would, no doubt, be unconstitutional."

In *Hamrick* v. *Barton*, 16 Wall. 166, this Court held that a title which has once become vested cannot be divested by any subsequent change of laws as to forms or solemnities of conveyance.

The decision of the Court of Appeals has not only rendered the agreement in the case at bar unenforceable, but has also nullified all unacknowledged agreements of every kind, made before the effective date of Sec. 18 of the Decedent Estate Law, by the terms of which a spouse or prospective spouse has waived or released all rights in the estate of the other spouse. This decision will also unquestionably result in confusion and uncertainty as to the validity and effect of future agreements of a similar nature, even though acknowledged. Let us assume, for example, that a man and woman enter into an agreement today, in contemplation of marriage, under which either one releases all interest in the estate of the other, and that the agreement is subscribed and acknowledged as provided by Sub. 9, Sec. 18 of the Decedent Estate Law, and let us further assume that ten years later the Legislature again changes the rights of descent and distribution,

and provides that such rights may be waived only by an agreement executed in the presence of two attesting witnesses, each of whom shall sign his name as a witness at the end of the instrument. Under the decision of the Court of Appeals in the case at bar this agreement, though valid when made, would become unenforceable.

The decision of the Court of Appeals has provided persons of designing disposition, who have signed away their rights, the means of escaping the effect of the instruments made by them. Through it Mrs. McGlone has been relieved of the obligation of her contract although she received its benefits, and one half of Mr. McGlone's estate has been taken from his sister, brothers and nephews and will be paid to the next of kin of Mrs. McGlone, notwithstanding her agreement renouncing all interest in her husband's estate.

POINT B.

UNDER THE INSTRUMENT OF FEBRUARY 2, 1922 WHICH WAS ACTED UPON BY MR. McGLONE AT THE TIME OF THE MARRIAGE ON FEBRUARY 4, 1922, HE ACQUIRED A VESTED RIGHT TO EXCLUDE MRS. McGLONE FROM CLAIMING ANY INTEREST IN HIS ESTATE.

Assuming, as the Court of Appeals did, that the instrument of waiver evidences a contract between persons in contemplation of marriage within the meaning of the Domestic Relations Law, that it is executed in a manner which satisfies the requirements of the Personal Property Law, and that the contractual rights created by that instrument are within the protection of the constitutional guaranty against impairment of obligations of contract and the taking of property without due process of law, it seems obvious that upon the consummation of the marriage Mr. McGlone acquired some definite right and Mrs. McGlone assumed a definite obligation.

What was her obligation under the contract? By its express terms she irrevocably renounced all right, title and interest she might, legally or otherwise, have in any estate, real or personal, of which Mr. McGlone might die seized.

Under the law in effect at the time this agreement was made, Mrs. McGlone's intestate share in the personal property of Mr. McGlone was substantially the same as that provided by the subsequent enactment (former Sec. 98, Sub. 2, Decedent Estate Law, and present Sec. 83, Sub. 4, Decedent Estate Law, effective Sept. 1, 1930). She also then had a right of dower in Mr. McGlone's real property (former Sec. 190, Real Property Law).

Her agreement, however, was not limited to a waiver of dower, nor was its efficacy dependent upon Mr. McGlone dying intestate. It did not obligate him to make a Will, or bequeath his property in a certain manner, nor did it restrain him from making a Will. It did not authorize the performance of an unlawful act, nor was it inconsistent with the power of the Legislature to fix the rights of descent and distribution. The interest in his estate she would have acquired, but for her agreement, could be diminished or enlarged by subsequent legislation, without affecting her rights in any way, because she had released all interest in his property. Nor could the Legislature, without constitutional infringement, give her any rights in derogation of the vested contract rights which the testator and his estate had already acquired.

Coolidge v. *Long*, 282 U. S. 582.

The contention of the Court of Appeals that an agreement waiving all interest in the estate of a prospective spouse is not effective as a release of the right of succession to property which the Legislature might thereafter create, flies in the face of the clear language of the agreement, the rights and obligations created thereby, and the rules of law governing antenuptial agreements which have been recognized and enforced from the earliest times. This very question was

considered in the case of *Matter of Smith*, 243 App. Div. 348. In a unanimous decision that Court said at pages 351, 352:

> "The statutory right which is invoked by the appellant is a part of an act passed by the Legislature in 1929, in effect September 1, 1930, and did not exist when the mutual release in question was executed. That fact alone, however, does not make the instrument inoperative as a release or waiver of appellant's right.
>
> "If the execution of this release was the free and unrestrained act of the appellant, and if her intention to relinquish every right which she had or might thereafter have in her husband's estate is clear and certain, then, undoubtedly, the instrument will prevent her from taking advantage of her statutory privilege of election, even though that right did not exist at the time of the execution of the release."

A person has a fundamental right to waive any right he has whether secured to him by contract, conferred upon him by statute, or guaranteed to him by the Constitution, except in cases where public policy intervenes.

> *People, ex rel. McLaughlin* v. *Police Commissioners*, 174 N. Y. 450.

And there is no rule of law or principle of public policy which prevents husband and wife from relinquishing by agreement before marriage the rights in each other's property which they would otherwise acquire by virtue of the marriage. If freely and intelligently made such agreements are conducive to marital tranquillity. To treat the right to so contract destructively would discourage entry into the marriage state in many instances, especially in a case such as this. Mrs. McGlone was sixty-two years old, she had two previous marital experiences, she had no children and was a woman of independent means. The companionship of her prospective husband and the comforts of home life must have been her paramount object in marrying him. The capacity to

settle in advance questions of property rights may be the turning point of such a marriage. Mrs. McGlone achieved her status as a result of her agreement not to claim any part of her prospective husband's estate. Having thus achieved her position, a change in her attitude amounts in effect to a fraud upon him and his estate. The parties cannot, of course, be placed in *status quo*, but the Court can and should exercise its unquestioned equitable power to prevent the consummation of this fraud.

When one relinquishes all interest in the estate of another, the nature of the right at the time of death, had it not been released, is immaterial. The question is one of intention of the parties. The decision of the Court of Appeals is not based upon any ambiguity in the language of the agreement, nor is there any basis for such a contention. There is no question that Mrs. McGlone intended to relinquish all interest in Mr. McGlone's estate. In effect, she agreed not to claim any interest upon his death. Williston on Contracts (Rev. Ed.), Sec. 1823, states: "There is no doubt in modern times that an attempted release of a future right must be construed as amounting at least to a covenant not to enforce the right whenever it arises." His right to exclude her from any share of his estate, and to prevent her from claiming an interest therein in violation of the agreement, was invaded by the subsequent enactment and taken without due process of law. That right vested upon the consummation of the marriage, and should be enforced in accordance with the terms of the contract and intention of the parties.

POINT C.

THE INSTRUMENT EXECUTED BY MRS. McGLONE COMPLIES WITH THE REQUIREMENTS OF SUB. 9, SEC. 18, OF THE DECEDENT ESTATE LAW, SO FAR AS THE SAME IS VALID.

The statute is quoted at pages 14 and 15 above. The first sentence of the section mentions "an instrument" of waiver

against a particular Will and an "agreement" of waiver against any Will. From this the appellee, in the courts below, attempted to draw far-fetched inferences as to the nature of the document to be employed. The history of the section shows that any type of agreement is proper. As noted above, originally it provided that an election to take against any Will might be made in "an agreement of settlement". This later was amended by deletion of the words "of settlement" and by the addition of the second sentence providing that a *waiver* or *release* of all rights, executed before the taking effect of the section, shall be deemed "to release the right of election". The intention was to remove all limitations on the type of document to be employed. Although the statute uses the term "agreement", it does not limit the scope of the word in any respect. There is no requirement that the agreement be "mutual" or "bi-lateral". The statute does not require the complete terms of the arrangements between the parties to be set forth, nor that a consideration be stated. The word "agreement" must be construed in the light of the field in which it is used, and essentially the term here means an agreement on the part of the surviving spouse surrendering his or her right, and the signature of such spouse alone is sufficient. In other words all the statute requires is a written instrument subscribed by the person to be charged therewith, waiving or releasing all rights in the estate of the other spouse. No further conditions are imposed by the statute. The statute provides that an instrument to this effect shall be deemed to release the right of election. The Court has no authority to add other conditions.

This very question was raised in the case of *In re Moore's Estate*, 165 Misc. 683, aff'd. 254 App. Div. 856, aff'd. 280 N. Y. 733, referred to on page 15 above. In that case the document in question read as follows:

> "The right of election to take against any Last Will and Testament executed by my wife, Edna Bradley Moore, pursuant to the provisions of Section 18 of the Decedent's Estate Law of the State of New York, as

amended by the Laws of 1929, Chapter 229, is hereby waived.

In Witness Whereof, I, the undersigned, husband of the above named Edna Bradley Moore, do hereby set my hand and seal this 24th day of May, 1935.

(Signed) RAYMOND W. MOORE

(Seal)"

This document, it will be noted, was not addressed to a particular will, but to *any* will. It does not set forth the complete terms and arrangements between the parties. It does not state a consideration, and it is signed only by the surviving spouse. Having been executed after the effective date of the statute, it is of course, acknowledged. The Surrogate held that the surviving spouse had waived his right of election. The Appellate Division affirmed unanimously, and the Court of Appeals affirmed with but one dissenting vote. On the question discussed above, Surrogate Foley said:

> "It will be noted that the section refers to an 'instrument' as the form of waiver to be executed against a specific will, and employs the word 'agreement' in reference to the form of the paper to be employed as a waiver of the right to elect against any will. The chief reliance of counsel for the husband sustaining his right to elect, in the face of the formal waiver executed by him, is the alleged distinction between these two terms. By highly refined, technical, tenuous arguments it is asserted that the word 'agreement' in the statute compels the making of a complete contract, that both husband and wife are required to execute the single instrument, and that the complete terms of the arrangements between the parties and the actual consideration must be set forth. These contentions are overruled.
>
> "The history of the preparation of the section by the Decedent Estate Commission, its original enactment by the Legislature in 1929, and the subsequent amendment made in 1930, all negative the interpretation of its terms urged by counsel for the husband here."

The Surrogate then discussed the history of the section and purpose of the amendments, as noted on page 15 above, following which he added:

> "Again the word must be inferred to have been used in the statute in the sense that is customarily employed in the nomenclature of the law of estates. There are many forms of such agreements constantly presented for consideration in the Surrogate's Courts and considered in the decisions of this court and the Appellate Courts. None of these instruments is required to be signed by all of the parties involved in the estate or even by two parties where the transaction is limited to that number. This group of instruments is composed of agreements to assign legacies or interests in estates specifically mentioned in section 32 of the Personal Property Law under the article of that statute entitled 'Agreements in writing'. Again there are agreements to renounce legacies, agreements to waive a fiduciary's commissions, agreements releasing fiduciaries from liability to account or approving a specific account and waiving its judicial settlement, section 251, Surrogate's Court Act, agreements releasing the surety on the bond of a fiduciary, agreements as to gifts and donations, agreements by a creditor relinquishing a claim against an estate or compromising such a claim. It should be noted also in the majority of these forms of relinquishment and releases, the instrument signed by the party surrendering the right to litigate seldom states the consideration paid in money or property. Nevertheless, they are supported in the courts as valid and effective. * * *
>
> "I find no intent whatsoever to limit the word 'agreement' in the statute to a formal contract executed by both spouses. 'The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day.' Cardozo, *J.*, in *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 91, 118 N. E. 214. * * *
>
> "The rights granted by the section might be waived by an instrument as to any single will and by an equally simple form of instrument against any will. * * * The terms of the section are not to be perverted

> to permit a person of designing disposition, who has signed away his rights, to escape the effect of the instrument made by him."

This view is also in accord with the law as it existed before the enactment of Sec. 18 of the Decedent Estate Law. Under pre-existing statutes a unilateral agreement affecting the marriage relation or rights thereunder, when acted upon, was valid and enforceable (Sec. 31, Sub. 3, Personal Property Law, *Wright* v. *Wright*, 54 N. Y. 437). The Appellate Division so held in the case at bar. The Court of Appeals did not disagree with this conclusion, having theretofore recognized the validity of such an agreement in *Matter of Moore* discussed above.

POINT D.

THE INSTRUMENT OF FEBRUARY 2, 1922 WAS MADE TO INDUCE THE MARRIAGE—IT HAD A VALID CONSIDERATION—THE MARRIAGE CONSTITUTED THAT CONSIDERATION.

It appears from the face of this document that it was made by Mrs. Snyder "on the eve" of her marriage to Mr. McGlone; it recites the coming marriage on February 4, 1922 and clearly was made in contemplation thereof. This construction was accepted by the Court of Appeals. In its statement of the facts that Court said (R., 50), "On February 4, 1922, the decedent, John J. McGlone, and Helena Day Snyder were married in England. In contemplation of that marriage Helena Day Snyder, on February 2, 1922, signed a paper writing which, it has been held, bars her right to take a share in her husband's estate." The instrument further recites that it was made "for good and sufficient reasons", that its maker is "of sound mind" and in possession of all her faculties, that she is possessed of a fortune of her own, that the execution of this instrument is an act of her "own free will", and that she thereby voluntarily and irrevocably

renounced all right, title and interest she might legally or otherwise have in any real or personal property of which her prospective husband might die seized.

That the instrument was made to induce the marriage becomes even more evident when we recall the circumstances of the parties. When she made this agreement Mrs. McGlone was certainly not lacking in experience or suffering from inequality. This was her third marital venture and Mr. McGlone's first. The marriage record discloses that she gave her age as forty-five when in fact she was sixty-two. She had no children, and was a woman of independent means.

The form of the agreement indicates that the parties believed there was a consideration and intended to affect their legal relations. "One does not commonly pledge one's self to generosity in the language of the covenant." Cardozo, *J.*, in *DiCicco v. Schweizer*, 221 N. Y. 431, 438.

The natural consequence of Mrs. Snyder's promise was to induce the marriage. Until the marriage occurred she was not bound. The failure to marry would have made the promise ineffective. From that moment there was no longer a real alternative, or as Judge Cardozo expressed it, "There was no longer what philosophers call a 'living' option. This in itself permits the inference of detriment." In *Smith v. Chadwick*, 9 App. Cas. 187, 196 (Eng.), Lord Blackburn said: "I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement."

The Appellate Division found as a fact that the instrument was signed to induce the marriage (R., 45), and that the marriage was the consideration (R., 48). The Court of Appeals expressed no disagreement with this conclusion.

In the case of *In re Scott, et al.*, 173 App. Div. 270, it appeared that the decedent married one Jeanie Graves, and that an antenuptial agreement had been made the day before the marriage. It recited that "whereas, and in view of"

her being marr to him on the 13th inst., and the fact that a widow under the laws of the United States can claim a third interest in her husband's estate, and that he had made a Will giving his real estate to his four children, that she thereby relinquished any and all claims she may have as his wife to her thirds in the real estate mentioned. The Surrogate had held the agreement invalid on the ground that the widow had received no consideration therefor or for the purported relinquishment of her dower rights in the real estate. The Appellate Division reversed the decision of the Surrogate, saying:

> "The fact that the agreement was made the day before the marriage, and in view of it, indicates clearly that the marriage was a part of its consideration, * * *."

and

> "We have held that the inference follows the agreement that it was made in consideration of the marriage."

The views of the Appellate Division in this case, and of the Court in *Matter of Smith*, above, represent the prevailing rule of law. An express statement of the consideration is unnecessary even in an ordinary contract (*Church* v. *Brown*, 21 N. Y. 315, 316), but this is especially true of marriage contracts. Where marriage is the consideration it need not be recited in the antenuptial agreement, and the latter will be enforceable so long as the marriage is actually solemnized. (*Moore* v. *Harrison*, 26 Ind. App. 408 at 411; *Richard* v. *Detroit Trust Co.*, 269 Mich. 411; *McNutt* v. *McNutt*, 116 Ind. 545; *Naill* v. *Maurer*, 25 Md. 532.) Even promises which are intended as gratuitous are enforceable when a marriage has taken place thereon (Williston on Contracts, Sec. 139, pp. 500-1, Sec. 486, pp. 1396-7).

Marriage in contemplation of law is not only a valuable consideration to support a contract between the parties to it, but a consideration of the highest value, and from motives of the soundest public policy is upheld with steady resolu-

tion. The parties to such a contract are deemed, in the highest sense, purchasers for value.

Magniac v. *Thompson*, 7 Pet. 348;
Previt v. *Wilson*, 103 U. S. (13 Otto) 22;
DeCicco v. *Schweizer*, 221 N. Y. 431, 438, 440.

In the courts below, the appellee contended that even if the parties to the contract considered the marriage to be the consideration this was insufficient since the parties had already agreed to intermarry. There is no evidence in the record which indicates that the engagement of the parties antedated the agreement of waiver or release. On the contrary, on the admitted facts, it is clearly evident that the agreement was made to induce the marriage. But aside from this, it has been repeatedly held that although the intended spouses may have been affianced prior to the execution of the antenuptial agreement, the consideration is not thereby vitiated, and the obligation of the promisor becomes binding immediately upon the marriage (*McNutt* v. *McNutt*, 116 Ind. 545; *Appleby* v. *Appleby*, 100 Minn. 408 at 428; *Bibelhausen* v. *Bibelhausen*, 159 Wisc. 365; *Hockenberry* v. *Donovan*, 170 Mich. 370). The usual form of marriage contract invariably recites that a marriage is intended to be solemnized, and that "in further performance of said agreement and in consideration of the said intended marriage it is hereby agreed and declared," etc. (Vaizey on Settlements, p. 108). These marriage contracts have nevertheless always been enforced by the Courts. Furthermore, until the marriage Mrs. McGlone had no rights to surrender in Mr. McGlone's property. There was only an offer by her to give up her rights if and at such times as the parties should marry. The marriage constituted an acceptance of the offer, and having received the benefits thereof, she is bound by her promise.

Even if there had been a prior engagement, the written instrument executed by her on February 2, 1922 merged mere oral negotiations, expressed the matured understanding of the parties and supplies the best evidence upon the subject

of property rights (*Appleby* v. *Appleby*, 100 Minn. 408, 429). As expressed in *McNutt* v. *McNutt*, 116 Ind. 545 at 559, "if parties put in writing their agreement concerning property and subsequently marry, the agreement, as written, is the source of evidence and furnishes conclusive proof of the matured and final contract." There is, however, no evidence in the record that an agreement to marry preceded the agreement of release made on February 2, 1922.

The February 2, 1922 instrument therefore had a valid consideration — the marriage constituted that consideration.

POINT E.

THE RIGHTS CREATED BY THE AGREEMENT IN THE CASE AT BAR ARE WITHIN THE CONSTITUTIONAL GUARANTY AGAINST IMPAIRMENT OF THE OBLIGATIONS OF CONTRACT AND TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A release of a future right amounts to a covenant not to enforce the right whenever it arises. Such release may be in the form of a waiver or of a promise. In any case it is given the effect of a contract not to assert a right of the sort described (Williston, Contracts, Rev. Ed., Sec. 1823).

The instrument executed by Mrs. McGlone on February 2, 1922 and acted upon by Mr. McGlone at the time of the marriage, constituted a contract. Whether it be deemed an agreement, a grant, release or even a gift, the rights which vested thereunder in the testator could not be destroyed by retrospective state legislation.

In *Coolidge* v. *Long*, 282 U. S. 582, the appellants appealed from a decree of the Probate Court assessing an inheritance tax. The validity of the statute imposing such tax was questioned on the ground that it was repugnant to the contract clause of the Federal Constitution and the due process and equal protection clause of the Fourteenth Amendment. The

appellants were trustees under a deed and declaration of trust executed on July 20, 1907, by J. Randolph Coolidge and Julia Coolidge, by which deed large amounts of real and personal property were transferred to the trustees by the settlors *voluntarily and without consideration*. The trustees were given extensive powers of management and investment; the income was to be paid to the settlors during their lives and the principal thereafter divided equally among their five sons. There was no power of revocation, modification or termination. Mrs. Coolidge died in January, 1921 and Mr. Coolidge died on November 10, 1925. The five sons survived the settlors. When the declaration of trust was executed, no statute was in effect under which the succession to the trust property could have been subject to the inheritance tax. This Court held that the statute imposing the tax impaired vested rights and was repugnant to the contract clause of the Constitution and the due process clause of the Fourteenth Amendment. At page 595 the Court said:

> "*The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution.* * * *
>
> "This Court has held that the Revenue Act of 1914, Sections 319-324, in so far as it undertook to impose a tax on *gifts* fully consummated before its provisions came before Congress (*Blodgett* v. *Holden*, 275 U. S. 142), or before its passage (*Untermeyer* v. *Anderson*, 276 U. S. 440), was arbitrary and repugnant to the due process clause of the Fifth Amendment. * * *
>
> "By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. *It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor.*"

Upon the consummation of the marriage Mr. McGlone acquired, under the instrument of February 2, 1922, the right to prevent Mrs. McGlone from claiming a part of his estate upon his death. This was an immediate and fixed or vested right of future enjoyment. Mrs. McGlone became obligated to

perform her promise not to claim any of the real or personal property of which he might die seized. This was a contract concerning property and conferring rights which may be asserted in a court of justice. As such, it came within the constitutional provision against laws impairing obligations of contract.

Dartmouth College v. *Woodward*, 4 Wheat. 518.

Any change in the law which materially impaired the means of legally enforcing the agreement of waiver, necessarily altered and impaired its obligation, in violation of the Constitution.

Sturges v. *Crowinshield*, 4 Wheat. 122.

The right to enforce Mrs. McGlone's promise not to claim any part of her husband's estate was destroyed by the subsequent enactment recognizing such an agreement only if executed with the formalities set forth in the new statute. This was taking one man's property for another's benefit without compensation, in violation of the due process clause of the Fourteenth Amendment (*Holden* v. *Hardy*, 169 U. S. 366).

POINT F.

THE AGREEMENT HEREIN CONSTITUTED A DELIBERATE AND INFORMED ABANDONMENT OF KNOWN RIGHTS—MR. McGLONE ALTERED HIS POSITION RELYING THEREON—MRS. McGLONE WAS ESTOPPED FROM ASSERTING THE RIGHT TO ELECT TO TAKE AGAINST HIS LAST WILL AND TESTAMENT.

In *Alsens A. P. C. Works* v. *Degnon Cont. Co.*, 222 N. Y. 34 at 37, the Court of Appeals defined a waiver as follows:

> "A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but

> for such waiver, the party would have enjoyed. It is the voluntary act of the party and does not require or depend upon a new contract, new consideration or an estoppel. It cannot be recalled or expunged. (*Hotchkiss* v. *City of Binghamton*, 211 N. Y. 279; *Clark* v. *West*, 193 N. Y. 349; *Draper* v. *Oswego Co. Fire Relief Assn.*, 190 N. Y. 12; *Zwietusch* v. *Luehring*, 156 Wis. 96.) It is essentially a matter of intention"

In the case at bar the instrument signed by Mrs. McGlone contains internal evidence that she was "of sound mind" and in possession of all her faculties when she executed the same; that it was an act of her "free will"; that she was possessed of an independent fortune; and that she understandingly renounced any interest in her prospective husband's estate. These recitals were equivalent to affirmative proof. If they were untrue the evidence thereof must have been available to Mrs. McGlone. She offered no evidence. The denials in her answer were not equivalent to proof. These recitals must therefore be accepted as true, and the agreement construed as an express and deliberate abandonment of her rights.

The Appellate Division found, and the evidence clearly indicates, that the agreement was made to induce the marriage. Mr. McGlone twice altered his position relying thereon. First, by marrying her, and second, by the execution of a Codicil to his Will, after the effective date of the new statute. His Last Will and Testament refers to the agreement (R., 13), and clearly evidences his reliance thereon. Had he not thereafter executed the Codicil, the right to elect created by Sec. 18 of the Decedent Estate Law would not have applied to this Will. The Court of Appeals conceded (R., 53) that Mr. McGlone would not have executed the Codicil to the Will if he had known his widow might on that account claim an interest in his estate. The only reasonable inference one can draw from this is that Mr. McGlone considered the agreement to be a valid release of all interest in his estate, and relying thereon executed the Codicil. Under the circum-

stances, it is submitted that Mrs. McGlone was estopped from asserting any claim to the real or personal property of which Mr. McGlone died seized.

Viewing the matter from the standpoint of justice and equity, it is little short of monstrous that having made this agreement with her eyes wide open, Mrs. McGlone should be permitted, after her husband's death, to repudiate the arrangement into which she voluntarily entered. The decision of the Court of Appeals that the facts herein did not give rise to an estoppel or other equitable ground for denying to Mrs. McGlone her statutory right of election, if permitted to stand, will serve as a veritable bulwark of protection for fraud.

POINT G.

APPELLANTS MADE OUT A PRIMA FACIE CASE UPON THE TRIAL, AND SINCE MRS. McGLONE FAILED TO PRESENT ANY PROOF, APPELLANTS WERE ENTITLED TO A DECREE AS PRAYED FOR IN THE PETITION.

Appellants rested upon the admissions in the pleadings, and three exhibits, consisting of the stipulation amending Mrs. McGlone's answer, by which she admitted that she made and delivered the agreement in question to Mr. McGlone at the time of its execution, the agreement itself, and the marriage certificate.

Mrs. McGlone offered no proof.

Upon this demonstration appellants made out a *prima facie* case. The burden of going forward with evidence shifted to Mrs. McGlone. Since she failed to offer any proof, appellants were entitled to a decree as prayed for in the petition.

Murray v. *Narwood*, 192 N. Y. 172 at 177, 178;
Whitlach v. *Fidelity and Casualty Co.*, 149 N. Y. 45 at page 50.

In the courts below the appellee contended that by reason of the relation of the parties it was necessary for appellants to affirmatively prove that there was no inequality, fraud or overreaching. There is no basis for this contention, as the Appellate Division found and held. The Court of Appeals expressed no disagreement with the views of the Appellate Division on this point. It is the law of the case that no presumption exists by reason of the relation of the parties, and that the burden of pleading inequality, fraud or overreaching is upon the widow (*In re McGlone's Will*, 256 App. Div. 1074). There was no issue of fraud, inequality or overreaching here, because it was not pleaded. Even if Mrs. McGlone had so pleaded, appellants would not have been required to prove she was not deceived or coerced, unless Mrs. McGlone first went forward with evidence indicating that she dealt with her prospective husband under circumstances of inequality. The mere fact that she released all rights in his estate is not sufficient.

Mrs. McGlone lacked neither years nor experience. She had reached that age when sentimental considerations in new marital undertakings are supposed to have little weight. The contract is one that persons advanced in life could with great propriety make, especially where one or both of the parties have previously been married. It is difficult to believe she was misled as to the contents of the agreement.

When a person signs an agreement such as this, some sanctity must be attributed to the act of signing. It may not be regarded merely as a lesson in penmanship. In the absence of evidence showing fraud or mistake, the signor is charged with knowledge of the character and contents of the instrument. The unchallenged proof that the instrument was genuine was sufficient to establish *prima facie* that it was binding upon Mrs. McGlone.

Pimpinello v. *Swift & Co.*, 253 N. Y. 159, 162;
Matter of Stone, 272 N. Y. 121, 124.

If Mrs. McGlone had in fact dealt with her prospective husband under circumstances of inequality or lack of understanding as to the nature of her act, the proof thereof was undoubtedly readily available to her. She offered no proof, and appellants were therefore entitled to judgment.

CONCLUSION.

Measuring this contract by the rules of law, reading it by the light of the attending circumstances, and looking to the object the parties intended to accomplish, there can be no doubt as to the effect that should be given its provisions. Its plain purpose was to remove all claim to Mr. McGlone's property. It would be a travesty on justice if this purpose is frustrated.

It is respectfully submitted that the order of the Court of Appeals, and the decree entered thereon, should be reversed.

Respectfully submitted,

PHILIP ZIERLER,
Counsel for Appellants,
Irving Trust Company and Thomas
F. McGlone, Jr., as Executors, etc.,
Rose McGlone Meredith and Thomas F. McGlone.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 51.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, *et al.*,

Appellants,

—vs.—

CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased,

Respondent.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK.

BRIEF OF APPELLANTS EDWARD McGLONE AND ROBERT McGLONE, INFANTS, BY RALPH L. KASKELL, JR., SPECIAL GUARDIAN.

RALPH L. KASKELL, JR.,
Special Guardian for Appellants
Edward McGlone and Robert McGlone,
Infants.

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I.

STATEMENT OF THE CASE.

The facts in this matter are not in dispute. They are to be found in the pleadings (R., 8-19) and in the short transcript of the hearing before the Surrogate (R., 19-22A).

Briefly, it suffices to say that Helena Day Snyder and John J. McGlone were married on February 4th, 1922. Before the marriage the prospective bride had executed and delivered the following document (R., 16):

"The Beverleys,
Osterley, Middlesex, England
February 2–1922.

Savoy Hotel,
London
WC 2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.

Helena Day Snyder"

Two days later the parties were married.

In August, 1930, McGlone made a will which bequeathed $2,000.00, or the equivalent in jewelry, to his wife. On September 1st, 1930, Section 18 of the Decedent Estate Law became effective, and, as amended, Subdivision 9 reads as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

In 1934 Mr. McGlone made a codicil which in no way affected the gift to Mrs. McGlone. In 1937 Mr. McGlone

died, and his widow then filed a claim to take one-half of his estate against his will.

The Court of Appeals, in an opinion by Chief Judge Lehman, has decided that the statute, effective in 1930, requires an acknowledgment for any agreement or waiver, whether executed before or after the effective date of the statute (R., 51). The Court of Appeals, for the purposes of this case, admits "that the instrument of waiver, though (fol. 82) unilateral in form, evidences 'a contract made between persons in contemplation of marriage' within the meaning of Section 53 of the Domestic Relations Law (Cons. Laws, ch. 14); that it is executed in manner which satisfies the requirements of Section 31 of the Personal Property Law (Cons. Laws, ch. 41); and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law."

The Court of Appeals then poses the only question before this Court: "what are those contractual or property rights which it is said are destroyed by the new statute?" (R., 52). From that point on it is our contention that the learned Court erred in concluding that nothing worthy of protection had been retroactively destroyed by the legislature of the State of New York.

The brief of the other appellants, contains all the formal statements necessary for the appeal and, to avoid repetition, this appellant will adopt said portions of that brief.

II.

ARGUMENT.

POINT A. It is conceded by the Court of Appeals that on February 2nd, 1922, Mrs. Helena Day Snyder made a valid contract with John J. McGlone with reference to their forthcoming marriage. The learned Court below also reaffirms the proposition that any contractual or property rights obtained in said contract are protected by Section 10,

Article I, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

POINT B. The instrument signed by Mrs. Helena Day Snyder gave her prospective husband definite rights arising out of contract alone. The future Mrs. McGlone bound herself to (a) not attempt to claim against the will of John J. McGlone, if any, and (b) not to interfere in any way with his estate if he died intestate. That contract, good when made, incorporated within itself all the existing law of the State of New York pertaining to that situation. Under that law that contract was concededly valid. The contractual right, of restraining Mrs. McGlone, became a vested contractual or property right of John J. McGlone, capable of enforcement by his heirs or next of kin. No statute may, within the Constitution of the United States, destroy that right.

POINT C. If the instrument be treated as a complete present transfer of all rights, present or future, in McGlone's estate, then it is not possible to justify the destruction of that instrument by subsequent legislation. The present transfer by a deed of future rights, is a recognized legal transaction; and, at the time this instrument was executed, it was so honored. The attempt to destroy that transfer, release, or deed, is clearly a violation of Section 1 of the Fourteenth Amendment.

POINT A.

THE INSTRUMENT WAS A VALID CONTRACT UNDER THE LAW OF THE STATE OF NEW YORK ON THE DATE OF ITS EXECUTION.

Although Chief Judge Lehman concedes the validity of the instrument as a contract (R., 52) it may be well to note again that the document was properly executed pursuant to Section 31 of the Personal Property Law (Cons. Laws, ch. 41), which read in part:

"Section 31, Personal Property Law:

AGREEMENTS REQUIRED TO BE IN WRITING.—Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or his lawful agent, if such agreement, promise or undertaking:

* * * * *

3. Is made in consideration of marriage, except mutual promises to marry."

The statutory law as to the force of such a document is contained in Section 53, Domestic Relations Law (Cons. Laws, ch. 14), wherein it was stated:

"Section 53, Domestic Relations Law:

CONTRACTS IN CONTEMPLATION OF MARRIAGE.—A contract made between persons in contemplation of marriage, remains in full force after the marriage takes place."

There is no claim of dower in this case so that Section 197 of the Real Property Law (Cons. Laws, ch. 49) has no application. There is no requirement of an acknowledgment; there is no requirement that such an instrument be witnessed; the sole requirement is that the instrument be in writing and subscribed by the person to be charged therewith. The case law applicable to such documents is well set forth by Judge Cardozo and Judge Crane in *De Cicco* v. *Schweitzer*, 221 N. Y. 431, 438, 439 and 440; and by Mr. Justice Scudder in *Schnibbe* v. *Schnibbe*, 109 Misc. Rep. 382, affirmed in 193 App. Div. 895, 179 N. Y. Supp. 54, on the opinion of Mr. Justice Scudder. Those cases serve to show that the law favors ante-nuptial agreements; that consideration in the technical sense is not required; and that, if consideration is needed, then marriage is good consideration.

Today the only change in the law is the added requirement that such a document be acknowledged (Subdivision 9, Section 18, Decedent Estate Law, Cons. Laws, ch. 13).

POINT B.

THE INSTRUMENT GAVE JOHN J. McGLONE CONTRACTUAL RIGHTS WHICH A SUBSEQUENT STATUTE MAY NOT, WITHIN THE CONSTITUTION, DESTROY.

It is at this point that the appellants believe the learned Court below erred. As the opinion of the Court of Appeals correctly states (R., 52), "Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights (*Matter of Sherman*, 153 N. Y. 1; *Norris* v. *Beyea*, 13 N. Y. 273)."

There can be no quarrel with that view of the law. The state may well abolish the right to make a will. It may even abolish the entire right to have property descend and be distributed to heirs and next of kin. It is our contention, however, that the state's power to do all of the foregoing does not give it the power to release a widow from contractual obligations solemnly agreed to by her, and which obligations were valid and binding on the date when she undertook the same (*Coolidge* v. *Long*, 282 U. S. 582, 595, 596). The state could destroy McGlone's right to make a will, but not his right to hold Mrs. McGlone to her agreement.

Let us assume that the state abolished the right to make a will. Mrs. McGlone had waived her right to take any share in the estate of her husband even though he died intestate. The instrument is broad and conclusive.

> "I hereby, volantarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized."

What do those words mean if not that the prospective bride wanted nothing from the estate of her prospective husband? The Courts of the State of New York recognized the

validity of a waiver of the right to share in a spouse's intestate estate.

In Re Gilmour, 146 Misc. Rep. 113, 260 N. Y. S. 761;
In Re Griffith's Will, 167 Misc. Rep. 366, 3 N. Y. S. (2) 925;
In Re Loeb's Estate, 155 Misc. Rep. 354, 280 N. Y. S. 354.

We do not deny the sovereign right of the State of New York to change the laws of descent and distribution, at will, provided vested rights are not destroyed. But it would be a mockery of the Constitution if that theory could be used to impair or destroy a good contract, secured in good faith by a prospective husband, made by the prospective bride to obtain marriage, and executed in accordance with all the existing requirements of law. What could prevent the Legislature of the State of New York from now requiring several witnesses in addition to the acknowledgment, and thus invalidating all contracts made between 1930 and 1941?

The Court of Appeals goes on to state (R., 53) that the contract is destroyed not by the statute itself but by the fact that the testator executed a codicil after the effective date of Section 18 of the Decedent Estate Law. That is quite a specious argument. Section 18 did not declare that waivers are void and against public policy. Section 18 did not require anything more for a good waiver other than an acknowledgment. There is nothing in Section 18 which says that the husband executes a will at the peril of waiving all prior contracts made with his wife, or prospective wife. Will the Court read into that statute a forfeiture? It is usually the rule that a forfeiture must be plainly set forth or else the Court will refuse to so find. Nothing in the entire law effective in 1930 would show a legislative intent to destroy all existing contracts. Rather there is merely an added requirement of an acknowledgment which the legislature incorrectly tried to apply retroactively. If, as Chief Judge Lehman says, "The legislature did not decree that a

will previously executed should not take effect at the testator's death in accordance with its terms", is there not so much more reason for protecting a pre-existing contract, something already a binding fixed obligation, and a vested right? The legislature had the right to destroy previously executed wills since nothing vests under a will until the death of the testator. If the legislature intended to have the execution of a codicil work the utter destruction of previously valid contracts that language would have been set forth in explicit terms.

The attitude of this Court is well set forth in *Osborn* v. *Nicholson*, 80 U. S. 654, 662, wherein it was stated at page 662:

> "Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose of and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to the 'general principles of law and reason', and of one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. * * * The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And this deprivation would be 'without due process of law'. This is forbidden by fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the states and the Nation."

See also:

Webster v. *Cooper*, 55 U. S. 488;
White v. *Hart*, 80 U. S. 646.

POINT C.

THE PROPERTY RIGHTS TRANSFERRED BY THAT INSTRUMENT, WHETHER PRESENT OR FUTURE, COULD NOT BE RETROACTIVELY DESTROYED.

If we consider the instrument as a present release or transfer of rights, either of immediate or future enjoyment, to either McGlone or to still undetermined beneficiaries of his estate, it is clear under the cases that a subsequent statute can not be permitted to destroy the transfer.

Coolidge v. *Long*, 282 U. S. 582;
Webster v. *Cooper*, 55 U. S. 488, 501-504;
United States v. *Heinrich*, 12 Fed. Rep. (2nd) 938, 940;
Aetna Life Ins. Co. v. *Hoppin*, 214 Fed. Rep. 928, 935.

CONCLUSION.

Considering this case in the light of the implications of the decision of the Court of Appeals, the appellants are constrained to submit that a reversal of the decision of said learned Court is required in order to prevent confusion and hardship. This case may well be the means of settling an untold number of disputes. An affirmance of the decision below would result in a declaration that it is impossible for a prospective husband and prospective wife, and a husband and wife, in the State of New York, to make a binding agreement between themselves with reference to their property.

It is respectfully submitted that the decision of the Court of Appeals, and the decree entered thereon, should be reversed.

Respectfully submitted,

RALPH L. KASKELL, JR.,
Special Guardian for Appellants
Edward McGlone and Robert McGlone,
Infants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~963~~ 51

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, ET AL.,

Appellants,

vs.

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

APPEAL FROM THE SURROGATE'S COURT OF KING'S COUNTY OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

ANDREW F. VAN THUN, JR.,
Counsel for Appellees.

WILLIAM J. CARR,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 968

IN THE MATTER OF THE APPLICATION OF IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, FOR A DETERMINATION OF THE RIGHT OF HELENA DAY McGLONE TO ELECT UNDER SECTION 18 OF THE DECEDENT ESTATE LAW TO TAKE AGAINST THE PROVISIONS OF SAID LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED.

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, THOMAS F. McGLONE, ROSE McGLONE MEREDITH, EDWARD McGLONE AND ROBERT McGLONE, INFANTS, by RALPH L. KASKELL, JR., SPECIAL GUARDIAN,

Appellants,

against

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED,

Respondent.

STATEMENT OF APPELLEE, OPPOSING THE JURISDICTION OF THE COURT, AND MOTION TO DISMISS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the appellee, Chase L. Day, as executor of the Last Will and Testament of Helena Day McGlone,

deceased, and in accordance with Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, hereby objects to the jurisdiction of this Court as asserted by the appellants and moves for a dismissal of the appeal herein upon the following grounds.

Statement of Facts.

Helena Day McGlone, then Helena Day Snyder, married the decedent, John J. McGlone, in London, England, on February 4, 1922.

On August 21, 1930, the decedent, John J. McGlone, made and executed his Last Will and Testament, in and by which he provided in paragraph "Third" thereof as follows: "Third: My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character".

On July 6, 1934, the decedent made and executed a Codicil to his said Will of August 21, 1930, in and by which he changed the provisions of the Will in reference to his brother, Ignatius V. McGlone, revoked the appointment of his brother, Ignatius V. McGlone, as executor and appointed another executor, and left intact the provisions made in his Will for the benefit of his wife.

The decedent died on February 22, 1937, in the County of Kings, State of New York. His said Will and Codicil thereto were duly proved and admitted to probate by the

Surrogate of the County of Kings, State of New York, on April 8, 1937. That on September 23, 1937, Helena Day McGlone, widow of the decedent, served, filed and caused to be recorded in the office of said Surrogate of the County of Kings, a notice of election to take her share of the estate of the decedent, as in intestacy, pursuant to the provisions of subdivisions 1 and 7 of Section 18 of the Decedent Estate Law of the State of New York (Chap. 13 of the Consolidated Laws of 1909, Section 18, as amended by Laws of 1929, Chap. 229, Section 4, in effect September 1, 1930, and by Laws of 1936, Chap. 114, in effect September 1, 1936.

That after the filing and recording of said notice of election, the executors of the Will of the decedent filed a petition in said Surrogate's Court, pursuant to Section 145 of the Surrogate's Court Act of the State of New York, praying for a determination of the right of said Helena Day McGlone to elect, under said Section 18, to take against the provisions of the Will of the decedent. It is alleged in the petition that said Helena Day McGlone, then Helena Day Snyder, on February 2, 1922, two days before her marriage to the decedent, "in contemplation and in consideration of said marriage between John J. McGlone and Helena Day Snyder, and for other good and valuable consideration" executed and delivered to said John J. McGlone the following instrument:

> "The Beverleys, Osterley, Middlesex, England. February 2, 1922. Savoy Hotel, London, W C 2.
>
> I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess in my own right, ample of this world's goods in the way of a fortune of my own as a compliment to my aforesaid husband, and for

other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized. Helena Day Snyder".

Said petition also alleged, "That at the time of the execution and delivery of said instrument said Helena Day Snyder had full knowledge of the nature, terms and effect thereof". That petitioners claim that by the said instrument the said Helena Day McGlone did "voluntarily and irrevocably agree to and did renounce, release and waive all right in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect", and that she "has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph "Third" of his will".

That said Helena Day McGlone, by answer to the petition and stipulation admitted the making and delivery of the said instrument, and denied the allegations that said instrument was executed "in contemplation and in consideration of said marriage", and "for other good and valuable consideration", and that she had "full knowledge of the nature, terms and effect thereof".

Upon the hearing of the issues raised by the petition and answer, the petitioners offered in evidence the stipulation amending the answer, the said instrument, and the certificate of marriage. No oral evidence was introduced by the petitioners, and no proof was made of the allegations of the petition denied by the answer. No oral evidence was offered by the said Helena Day McGlone. The Surrogate found that the estate of the decedent was valued, in the Estate Tax proceeding, at $235,852.74, as stated in the opinion of the Surrogate.

The Surrogate made a decree to the effect that said Helena Day McGlone was "entitled to exercise her personal

right of election to take against the terms of the Will and Codicil of said decedent", and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by her and filed and recorded, was a valid and effective exercise of such right of election. The Surrogate rendered an opinion which is reported in 171 Misc. Reports, page 612.

Upon appeal by the petitioners to the Appellate Division of the Supreme Court of the State of New York, Second Department, the decree of the Surrogate was reversed. The opinion of the Appellate Division is reported in 258 App. Div. Reports, page 596.

Upon appeal to the Court of Appeals of the State of New York the order of the Appellate Division was unanimously reversed and the decree of the Surrogate's Court affirmed. The opinion of the Court of Appeals is reported in 284 N. Y. 527.

I.

The Appeal is Not Authorized under Section 237 of the Judicial Code (28 United States Code, Section 344).

Appellants' rely, primarily, upon Section 237a of the Judicial Code (Act of February 13, 1925, Ch. 229, 43 Statutes, 936, 937; U. S. Code, title 28, Section 344) to sustain the jurisdiction of this Honorable Court. In order that this Court might entertain jurisdiction, the "validity of the Statute of the State" must have been drawn in question and its validity sustained. We submit that the Statute (Decedent Estate Law, Section 18) did not invade or take away any rights that the testator may have acquired by the instrument executed by Helena Day Snyder on February 2, 1922, two days before her marriage, which were protected by the Constitution of the United States.

The Court of Appeals in consideration of the appeal to that court *assumed without deciding or even considering*

that the alleged instrument of waiver "evidenced, 'a contract made between persons in contemplation of marriage' within the meaning of Section 53 of the Domestic Relation Law * * *; that it is executed in manner which satisfies the requirements of Section 31 of the Personal Property Law * * *; and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law". And the court then stated, "That brings us to the question: What are those contractual or property rights which it is said are destroyed by the new Statute?"

At the time of the making of the alleged instrument by Helena Day Snyder, and at the time of the making of the original Will by the decedent, the decedent had the right, given him by Statutory Law of the State, to dispose of all his property to strangers, except that he could not deprive his wife of her right of dower in any real property of which he was seized during the marriage; and thus the wife would have no right to share in his estate, except by way of dower (Decedent Estate Law, Sections 10 and 15).

On July 6, 1934, the decedent made and executed a Codicil to his Will which under the law of the State is deemed a new Will as of the date of the Codicil (Decedent Estate Law, Section 2; *Matter of Greenberg*, 261 N. Y. 474, 477, 479; opinion of Chief Judge Lehman herein).

Prior to and at the time of the making by the decedent of said Codicil to his Will the Legislature of the State of New York had enacted Section 18 of the Decedent Estate Law, and had abolished inchoate rights of dower, and the right of dower of a widow, except in such lands whereof her husband was seized prior to September 1, 1930 (Real Property Law, Section 190, as amended by Laws of 1929, Ch. 229, Section 12). Thus, by the enactment of Section 18 of the Decedent Estate Law, the Legislature had placed limi-

tations and conditions upon the rights previously existing of a husband or wife to dispose of his or her property, by Will, as to the other or surviving spouse.

The right to make a Will disposing of one's property is, under the Law of New York, and cases decided by this Court, a statutory right only.

Matter of Sherman, 153 N. Y. 1, 3;
Matter of Delano, 176 N. Y. 486, 491, 492;
Brearley School v. *Ward*, 201 N. Y. 358, 368, 373;
Matter of Watson, 226 N. Y. 384, 395; reviewed and aff'd in 254 U. S. 122;
United States v. *Perkins*, 163 U. S. 625, 627;
Mager v. *Grima*, 8 How. (United States) 490, 493;
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288.

In the *Perkins* case, *supra*, this Court stated at page 627:

> "While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control".

That the State, in enacting legislation governing rights as to the disposition of property of a citizen by Will, does not enter into any *contract* with the citizen to the effect that existing law shall not be changed. The contention of appellants would seem to be that the decedent by the instrument in question acquired rights under the existing law which could not be destroyed by legislation without violating the Federal Constitution. But the appellants have overlooked the necessity that a right protected by the Constitution must be a *vested* right. "It must be something more

than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property" (*People ex rel. Eitel* v. *Lindheimer*, 271 Ill. 367). This case was appealed to this Court and the motion to dismiss the appeal was granted for want of a substantial Federal question, in 308 U. S. 505.

The Court of Appeals has stated in its opinion in this case, in respect to the instrument signed by Helena Day Snyder, which the court, for the purpose of argument, assumed to be a contract, that:

> "Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of the estate of her 'husband to be' which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the property of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights (*Matter of Sherman*, 153 N. Y. 1; *Norris* v. *Beyea*, 13 N. Y. 273). A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver.
>
> "The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his

property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly-created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she would not otherwise have. That does not however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right".

What we have said above is based on the assumption that the instrument in question constituted a valid contract. In all the courts below, we argued that the instrument was not a contract within the meaning of the Federal constitutional provision; that it lacked consideration; that it was unilateral in character and did not bind John J. McGlone in any manner as to the disposition of his property; that the ceremony of marriage was not a consideration for it, as the agreement or engagement to marry had already been made at the time the instrument was signed and delivered. That the instrument amounts to nothing more than a gratuitous

promise. The Surrogate, in his elaborate opinion, reviewed the question whether the instrument was in reality a contract and found it was not, and also reviewed the question whether it was a contract within the contemplation of the Federal Constitution.

It was well stated by Judge Cardozo in *DeCicco* v. *Schweizer*, 221 N. Y. 431, at page 438: "One other line of argument must be considered. The suggestion is made that the defendant's promise was not made *animo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its *motive* in the engagement of the daughter to the Count. Undoubtedly the prospective marriage is not to be deemed a consideration for the promise 'unless the parties have dealt with it on that footing'" (Holmes, Common Law, p. 292; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 579). 'Nothing is consideration that is not regarded as such by both parties' (*Philpot* v. *Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn.* v. *Wickham*, *supra*). But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers".

The appellants did not produce at the hearing before the Surrogate any evidence of consideration moving from the decedent, for the making of the instrument by his prospective wife, as alleged in the petition to the Surrogate's Court by allegations denied by the answer. The appellants rely solely on the language of the instrument, which absolutely fails to state any consideration, and contend that the marriage itself was valuable consideration.

This Court has held in *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625, at page 630, as follows: "A contract should be clearly proved before it invokes the protection of the Federal Constitution". Also, in *Crane* v. *Hahlo*, 258 U. S. 142, at page 145, it was held: "While, under the holdings in People *ex rel.* Crane *v.* Ormond, 221 N. Y. 283,

and Etter *v.* City of Tacoma, 228 U. S. 142, the decedent of the plaintiff in error had a vested property right to compensation after completion of the viaduct, very clearly this was not a contract right in a constitutional sense. It has long been settled by decisions of this court that the word 'contracts' in section 10 of Article I of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent' (express or implied) to its terms is of its very essence (citing cases)". Also in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, it is stated at page 667: "The contract protected by this clause (Constitution, Article I, Section 10) must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed a revocable license".

II.

The Decision of the Court of Appeals of the State of New York Was Based on Non-Federal Grounds Adequate to Support It.

The Court of Appeals has held that the testator husband having made a new will subsequent to the enactment of Section 18 of the Decedent Estate Law, his widow by virtue of that statute became entitled, upon the execution of the new will, to a right of election to reject the provision made for her in the will and to take her share of his estate "as in intestacy". Such right of election being given in the event that the testator husband has not devised or bequeathed, in trust, to his wife an amount equal to or greater than the intestate share. By the new will there was given to the wife the sum of Two thousand ($2,000.00) dollars, when the estate of the testator amounted at his death to $236,852.74. The Court of Appeals further held that the instrument in

question, considered as a contract, "did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract" • • • "The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect".

Cases decided by this Court and believed by the appellee to sustain his contention, are:

Hammond v. *Burbank*, 299 U. S. 519;
Lynch v. *New York ex rel. Pierson*, 293 U. S. 52;
Eustis v. *Bolles*, 150 U. S. 361;
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 78;
Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157, 163;
Cross Lake Club v. *Louisiana*, 224 U. S. 632, 638.

The appellee, Chase L. Day, as executor, etc. of Helena Day McGlone, basing his motion upon the foregoing statement and the record before this Court, respectfully moves that the appeal allowed to be filed herein be dismissed, and that the appellee be awarded his costs.

Respectfully submitted,

ANDREW F. VAN THUN, JR.,
Attorney for Appellee, Chase L. Day, as Executor, etc.

WILLIAM J. CARR,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 51.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, *et al.*,

Appellants,

—vs.—

CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased,

Appellee.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK.

BRIEF OF APPELLEE, CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

ANDREW F. VAN THUN, JR.,
Attorney for Appellee,
Chase L. Day, executor, etc.

ANDREW F. VAN THUN, JR.,
GEORGE H. BURTIS,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 51.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, *et al.*,

Appellants,

—vs.—

CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased,

Appellee.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK.

BRIEF OF APPELLEE, CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

I.

THE OPINIONS OF THE COURT BELOW.

The opinion in the Surrogate's Court is reported in 171 Misc. 612 (R., 23).

The opinion in the Appellate Division is reported in 258 App. Div. 596 (R., 42).

The opinion in the Court of Appeals is reported in 284 N. Y. 527 (R., 49).

II.

STATEMENT.

In the statement of the case made in the brief of the appellants, Irving Trust Company and another, it is stated that the instrument in question is in "script," but fails to state that the instrument is not holographic, except the signature thereon of Helena Day Snyder, as was admitted on the trial (R., 20).

It is also stated in the said brief (pages 6, 7) that, "The Court of Appeals did not disagree with the findings or opinion of the Appellate Division, except its conclusion that the statute is repugnant to the Constitution of the United States, and invaded contract rights which vested in the testator prior to its enactment." The Appellate Division made no findings of fact; stated that the facts were not in dispute, and "they were contained in the pleadings, certain stipulations, and two documents" (R., 42). The Court of Appeals did not state that it agreed with the grounds of reversal advanced by the Appellate Division, but on the contrary stated, "We have examined these other grounds and without now deciding whether all of them are without substance we assume that the Appellate Division did not err in rejecting them; but we are constrained to disagree with the conclusion of the Appellate Division that the testator acquired by the instrument executed in 1922 in contemplation of marriage, contractual rights protected by the Constitution of the United States, which had been invaded by the new statute" (R., 52).

In the appellants' brief, at page 5, it is stated that, "A motion for judgment on the pleadings was made by all parties (Papers on Appeal, *In re McGlone's Will*, 256 App. Div. 1074), and that the order denying the motion was affirmed by the Appellate Division, but that court reversed the Surrogate on the law of the case," and then quotes part of the opinion of the Appellate Division. The appellants omit quoting the last sentence of the opinion which reads: "The burden of proof on the whole case is upon the petitioners-

appellants, and the widow is not required to go forward with evidence unless and until the petitioners-appellants have made out a prima facie case under the pleadings as they now stand." The Appellate Division on the second appeal from the decree of the Surrogate, after hearing the case, states that, "These views respecting burden of proof were stated more briefly on a prior appeal in this case (256 App. Div. 1074) and result from a re-examination of the subject" (R., 46).

We respectfully submit that the specification of errors made by said appellants in their brief (page 7) are without merit and do not require consideration by this court, except as to those numbered "b" and "d."

This court, in deciding the motion by the appellee for the dismissal of the appeal for lack of jurisdiction, handed down the following memorandum on May 12, 1941: "In this case probable jurisdiction noted. Further consideration of motion to dismiss is postponed to the hearing of the case on the merits."

ARGUMENT.

POINT A.

THE APPELLANTS FAIL TO PRESENT ANY QUESTION FOR REVIEW AND DETERMINATION BY THIS COURT, ARISING UNDER SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES AND SECTION 1 OF THE FOURTEENTH AMENDMENT THERETO.

(a)

The execution by the decedent, John J. McGlone, of the codicil to his last Will and Testament, after August 31, 1930, had the legal effect, under the law of New York, of making a *new* will, operative under the provisions of Section 18 of the Decedent Estate Law, and gave his wife, as the surviving spouse, a "personal right of election" to take her share of the estate of her husband "as in intestacy," because

the decedent failed to make a "testamentary gift of an equal sum with the intestate share, or a gift in trust of such a sum for the use of the surviving spouse for life, or a combination of such gifts providing in the aggregate at least such a sum" that would constitute an equivalent of the intestate share. The decedent herein made a testamentary gift of $2,000.00 to his wife, though his estate amounted to the appraised value of $236,852.74 (R., 24, 32).

Matter of Greenberg, 261, N. Y. 474, 478;
Matter of Byrnes, 260 N. Y. 465, 470;
Decedent Estate Law, Section 2.
Matter of Lavine, 167 Misc. (N. Y.) 879, 881-882.

The statutory personal right of election given to the widow of the decedent, having been exercised by her in pursuance to the statute, entitled her to reject the provision of the will made in her favor and to enjoy the rights in the estate of her deceased husband provided for her by said Section 18 of the Decedent Estate Law. This personal right given to the widow was an absolute right, and could not be waived by her except in the manner provided in subdivision 9 of said section 18.

Matter of Byrnes, 260 N. Y. 465, 469, 470, 472;
Matter of Greenberg, 261 N. Y. 474, 478, 479;
Matter of Clark, 275 N. Y. 1, 5.

It is claimed by the appellants that the instrument executed by Helena Day Snyder on February 2, 1922, two days before her marriage to John J. McGlone, is a bar to her right to elect to take her intestate share in the decedent's estate, as against his will.

The instrument does not bar the right of the surviving spouse to elect to take against the will of the decedent. Subdivision 9 of said section 18 provides for three distinct methods of waiver: (1) Waiver as to a *particular* will by an *instrument* subscribed and duly acknowledged. (2) Waiver as to *any* will by an *agreement* so executed made

before or after marriage, and after the effective date of the section. (3) Waiver by an *agreement so executed made before the taking effect of this section* wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section. In the present instance we are concerned with the third case (italics ours). The instrument in question, not being acknowledged, does not comply with the specification of the statute.

(b)

The further question now arises whether the said instrument executed and delivered by Helena Day Snyder to John J. McGlone, on the "eve" of their marriage, created any contractual or property rights in favor of John J. McGlone which have been impaired or destroyed by the subsequent enactment of Section 18 of the Decedent Estate Law.

The Court of Appeals in its opinion assumed, "without now deciding or even considering such questions further, that the instrument of waiver though unilateral in form, evidences a 'contract made between persons in contemplation of marriage,' within the meaning of Section 53 of the Domestic Relations Law; that it is executed in manner which satisfied the requirements of Section 31 of the Personal Property Law; and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law"; and then put the question, "What are those contractual or property rights which it is said are destroyed by the new statute?" The court answered the question as follows:

> "Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of

the estate of her 'husband to be' which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the property of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights (*Matter of Sherman*, 153 N. Y. 1; *Norris* v. *Beyea*, 13 N. Y. 273). A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver. The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she

would not otherwise have. That does not, however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right" (R., 52, 53).

In the case of *United Firemen's Insurance Co.* v. *Thomas*, 82 Fed. 406 (U. S. Cir. Ct., 7th C.), a waiver is defined as follows:

> "Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward. Bishop, Contr. sec. 792. But manifestly there can be no waiver of a non-existing right,—of that which does not exist."

And in *McCarty* v. *Piedmont Mutual Insurance Company*, 81 S. C. 152 (62 S. E. Rep. 1), waiver is defined as follows:

> "Waiver generally involves the relinquishment of a known or existing right. Estoppel by misrepresentation generally involves some misrepresentation of a past or existing fact. Hence, generally, representations *de futuro* do not form the basis of waiver or estoppel." (And the court cites *Union Mut. L. Ins. Co.* v. *Mowry*, 96 U. S. 546, as a leading authority on the subject.)

In New York, a waiver has been defined, in *Davison* v. *Klaess*, 280 N. Y. 252, 261, as follows:

> "Waiver is 'voluntary and intentional relinquishment or abandonment of a known existing, legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed' (67 C. J. 289; *Masons' Supplies Co.* v. *Jones*, 58 App. Div. 231; affd. 172 N. Y. 598)."

See, also:

Clark v. *West*, 193 N. Y. 349, 360;
Alsens A. P. C. Works v. *Degnon Cont. Co.*, 222 N. Y. 34, 37;

Lord Const. Co. v. *Edison P. C. Co.*, 234 N. Y. 411, 415;
Jonas v. *City of West Palm Beach*, 76 Fla. 66 (79 So. Rep. 438).

The Surrogate fully considered the question of waiver in his opinion herein (R., 31).

At the time of the execution and delivery of the said instrument by Helena Day Snyder, and at the time of the making of his will, executed August 21, 1930, John J. McGlone had the right given him by common and statutory law of the State to dispose of all his property to strangers, except he could not deprive his wife of the right of dower in any real property of which he was seized during the marriage; and thus his wife, if he had died previous to September 1, 1930, would have had no right to share in his estate, except to the extent of the right of dower in the real property of which he might have died seized.

Decedent Estate Law, sections 10, 15;
Opinion of the Court of Appeals herein (R., 50, 51).

(c)

The said instrument, assuming it to be an ante-nuptial contract, gave John J. McGlone no greater right to dispose of his personal property or estate by will than he already had by law. The instrument was not operative, as a jointure, nor as a bar by pecuniary provision, to deprive his intended wife of any right of dower in the real property of which he might have been seized during marriage.

N. Y. Real Property Law (Laws of 1909, chap. 52, art. 6) sections 190, 197, 198;
Graham v. *Graham*, 67 Hun 329; affd. 143 N. Y. 573.

The right to make testamentary disposition of one's property is a creature of statute.

Matter of Bergdorf, 206 N. Y. 309, 316;
Matter of Watson, 226 N. Y. 384, 395; reviewed and affirmed in 254 U. S. 122;

United States v. *Perkins*, 163 U. S. 625, 627;
Mager v. *Grima*, 8 How. (U. S.) 490, 493;
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288.

(d)

While the Court of Appeals assumed that the instrument was a contract made in contemplation of marriage, and held that no contractual or property rights arose from it which were destroyed by the subsequent enactment of Section 18 of the Decedent Estate Law, we will also approach the constitutional question from the angle that the instrument is not a contract from which arose any obligation on the part of the wife to renounce any rights in her husband's estate, nonexistent at its date and not even resting in expectancy, to which she might have become entitled pursuant to the statutory law of New York enacted subsequently to the date of the instrument. It would seem impossible that a statutory right which did not exist at the time the instrument was executed could be waived, renounced, released, or transferred by an instrument such as the one in question. The public policy actuating the Legislature in enacting Section 18 of the Decedent Estate Law, and also abolishing the rights and estates of dower and curtesy in the future, was stated by Chief Judge Pound of the Court of Appeals, in the *Matter of Greenberg*, 261 N. Y. at page 478, as follows:

> "After September 1, 1930, the absence of protection to the widow under prior laws gave way to the widow's right of election to take a specific part of the estate against the will. The inconsistency in our old law which compelled a man to support his wife during his lifetime and permitted him to cut her off with a dollar at his death, has given way to a new public policy which no longer permits a testator to dispose of his property as he pleases."

The legislation was a radical departure from the existing common and statutory law of New York as to the descent

and distribution of property and the right of testamentary disposition as to a surviving spouse. The right given to a surviving spouse to take against the will of the deceased spouse made after the enactment of the statute is absolute unless waived in the manner provided by subdivision 9 of section 18 of the same statute.

(e)

Aside from the fact that the instrument was not acknowledged, it is not an agreement or contract within the constitutional provision forbidding a State from passing any law impairing the obligations of contracts. A contract must be clearly proved before it invokes the protection of the Federal Constitution.

> *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625, 630;
> *Crane* v. *Hahlo*, 258 U. S. 142, 145;
> *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 667.

The instrument is not under seal. It is unilateral and gratuitous in character. On its face it does not show consideration of any nature given by the prospective husband to the prospective wife and none can be implied; nor does it show any settlement of marital rights based upon any valuable consideration. It is not instinct with obligation on the part of the prospective wife of such a nature that a breach of it would result in detriment to the prospective husband. The prospective wife was not benefited by any promise given or consideration furnished by the prospective husband. It professes to embrace and to renounce rights which the prospective wife would not acquire by the marriage, for the existing law gave her no rights in the personal property of the husband. It is a nude pact.

See:

> Williston on Contracts (Revised Edition) sections 13, page 21; 102a; 104, 141;

Komp v. *Raymond*, 175 N. Y. 102, 107, 108;
Grossman v. *Schenker*, 206 N. Y. 466, 468;
Moran v. *Standard Oil Company*, 211 N. Y. 187, 197, 198;
DeCicco v. *Schweizer*, 221 N. Y. 431, 433, 435;
Wood v. *Duff-Gordon*, 222 N. Y. 88, 91, 92;
Schlegel Mfg. Co. v. *Cooper's Glue Factory*, 231 N. Y. 459, 461;
McGovern v. *City of New York*, 234 N. Y. 377, 388, 389, 390;
Beck v. *Sheldon*, 259 N. Y. 208, 211;
Nassau Supply Co. Inc. v. *Ice Service Co. Inc.*, 226 App. Div. 368, 370; affd. 252 N. Y. 277.

(f)

The appellants contend that the husband acquired by the instrument "the right to prevent Mrs. McGlone from claiming a part of his estate upon his death" (Brief, pages 30, 31) under the existing law which could not be destroyed by the subsequent legislation, without violating the contract clause of the Federal Constitution. The trouble with that contention is that the wife had no rights in the personal property of her husband under the existing law, arising from the marriage status, which the husband could claim or acquire by contract; her rights were confined to dower [illegible] her husband's real property which the instrument did n[illegible]. Assuming, for the argument, that the husband a[illegible]ed any rights from his wife, which would be protected b[illegible] the Federal Constitution, they must have been such as would vest property rights in him amounting to something more than mere expectations or possibilities, and such as had become ripened into title, legal or equitable, to the present or future enjoyment of property.

Baker's Executors v. *Kilgore*, 145 U. S. 487, 489;
People ex rel. Eitel v. *Lindheimer*, 371 Ill. 367 (The appeal to this court was dismissed in 308 U. S. 505).

(g)

The appellants flatly denominate the instrument an ante-nuptial contract by which the husband acquired vested rights, without showing in the slightest degree that the instrument embraces the essentials of a valid ante-nuptial contract. They say that the consideration for it was the marriage of the parties. The instrument shows on its face that, at its date, the parties had agreed to marry and had fixed the date for the ceremony of marriage. It fails to show that the parties viewed or intended the subsequent marriage as consideration for the making of it, and no such inference can be drawn from it. There is no evidence in the record that the parties viewed or intended that the marriage should be the consideration for the making of the instrument.

> "Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise 'unless the parties have dealt with it on that footing' (Holmes, Common Law, p. 292; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 579). Nothing is consideration that is not regarded as such by both parties (*Philpot* v. *Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn.* v. *Wickham*, *supra*)." (Opinion by Cardozo, *J.*, in *DeCicco* v. *Schweizer*, 221 N. Y. 431, 438.)

Blanshan v. *Russell*, 32 App. Div. 103, 104; affirmed on opinion below in 161 N. Y. 629;
Cloyes v. *Cloyes*, 36 Hun (N. Y.) 145, 146;
Carpenter v. *Taylor*, 164 N. Y. 171, 177

An ante-nuptial contract, in the common and legal acceptation of the term, is one by which a prospective husband and a prospective wife mutually agree upon the settlement of their mutual property rights in the estates of each other, particularly the rights of dower and curtesy, and makes provision for the parties after death, or provides for mutual releases of rights in their respective estates.

Curry v. *Curry*, 10 Hun (N. Y.) 366, 368-369;
Pierce v. *Pierce*, 71 N. Y. 154, 157;

Matter of Young, 27 Hun 54; affd. 92 N. Y. 235;
Johnston v. *Spicer*, 107 N. Y. 185, 189, 191;
Graham v. *Graham*, 67 Hun 329, 332-333; affd. 143 N. Y. 573 (The report of the case at the General Term sets forth the agreement in full);
Matter of Stilson, 85 App. Div. (N. Y.) 132, which states in full the agreement of the parties.

(h)

The Appellate Division in its opinion herein (R., 42, 44, 46, 47) also denominated the instrument an ante-nuptial contract, and held that its introduction in evidence made a *prima facie* case for the petitioners in the absence of any evidence on behalf of the widow. It held that the "unilateral agreement" was sufficient because it had been acted upon by the prospective husband. It held that "when that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights." The court stated that "the instrument was valid under the pre-existing statutes (Dom. Rel. Law, sec. 53; Pers. Prop. Law, sec. 31, subd. 3)." The court further stated: "This vesting accrued before the enactment of subdivision 9 of section 18 of the Decedent Estate Law (added by Laws of 1929, chap. 229, and amd. by Laws of 1930, chap. 174). The subsequent enactment, therefore, violated the testator's constitutional rights (U. S. Const., art. 1, sec. 10; State Const., art. 1, sec. 6). By the former the State is forbidden to pass any law impairing the obligation of contracts, and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid (citing cases)." The court held that the saving clause contained in subdivision 9 was valid, upon deletion therefrom of the words "so executed," which deletion really deletes the words "duly acknowledged" from an instrument executed prior to the enactment of the statute. The court further stated: "This leaves one further question—that of consideration. The February 2, 1922 instrument had a valid

consideration. The marriage constituted that consideration. It has long been recognized as 'among the highest consideration known to the law' (citing cases). Accordingly, the instrument of February 2, 1922, under the proof herein constituted a complete bar to the right of the widow to elect to take against the will and codicil of the testator." The opinion does not indicate in what respect the prospective husband acted upon the instrument, or what were the "certain contract rights" which "vested" in the husband under it, or what rights in the property of the husband the wife acquired, which she could renounce or waive. All the cases cited by the court to the effect that the marriage was the consideration for the alleged contract clearly show that the promise to marry the prospective husband was the consideration for the transfer of property to her, or other provision made for her; and the subsequent marriage was only in fulfillment of the promise to marry upon the conditions attached to the promise. There is no evidence in the record here that the making of the instrument in question was based or conditioned upon any promise by the prospective husband to marry the prospective wife.

POINT B.

THE MERE INTRODUCTION IN EVIDENCE BY THE PETITIONERS OF THE INSTRUMENT OF FEBRUARY 2, 1922, AND THE MARRIAGE CERTIFICATE, AND THE STIPULATION AMENDING THE ANSWER TO THE PETITION WHICH ADMITTED THE MAKING AND DELIVERY OF THE INSTRUMENT, DID NOT MAKE OUT A PRIMA FACIE CASE FOR THE PETITIONERS. THE PETITIONERS DID NOT MAKE OUT SUCH A CASE AS WOULD SHIFT THE BURDEN OF PROOF TO THE WIDOW.

The appellants have contended from the beginning, and the Appellate Division held, "that the unchallenged proof that this instrument was genuine was sufficient to establish

prima facie that it was binding upon the widow (*Pimpinello* v. *Swift & Co.*, 253 N. Y. 159, 162; *Matter of Stone*, 272 id., 121, 124)." The Appellate Division also held that the "widow in seeking to repudiate her solemn writing was not aided by or armed with a presumption of inequality (*LaTourette* v. *LaTourette*, 54 App. Div. 137, 138), in the absence of some proof casting suspicion upon or tending to vitiate the instrument."

In both the *Pimpinello* and *Stone* cases the transactions were not between prospective wife and prospective husband, or between husband and wife, but between strangers. The doctrine that ordinarily "the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby," though his mind never gave assent to the promise expressed therein, is applicable only to strangers, dealing on equal terms, and is not applicable to the relationship existing between a prospective wife and a prospective husband, or between husband and wife (*Pierce* v. *Pierce*, 71 N. Y. 154, 159; *Hutchinson* v. *Ross*, 262 N. Y. 381, 400; *Matter of Smith*, 243 App. Div. 348, 352, 354; *Peyton* v. *William C. Peyton Corp.*, 7 Atl. Rep. (2d) 737). In the *LaTourette* case, the plaintiff husband brought an action against his wife seeking to avoid transfers and conveyances made by him to her on the ground of fraud, and the court held that the husband was not armed with any presumption of inequality arising from the relationship of husband and wife, and that the "law does not presume that the head of a family is dominated by the wife, and hence it follows in this case that the alleged fraud must be proved."

The instrument here in question, on its face, is utterly lacking in the expression of any consideration for the making of it by the prospective wife, and under such circumstances it does not *prima facie* establish a case for the petitioners. Even between strangers the instrument itself would not be held to be a valid obligation without proof of consideration.

The relationship created between prospective husband and prospective wife being of a fiduciary character and involving

mutual confidence and frankness to a high degree, any agreement of an ante-nuptial nature made by them must be based upon fair dealing and good faith. When it appears that the provision made for the wife is "inequitable, unjust and unreasonably disproportionate to the means" of the prospective husband every presumption is raised against the validity of the alleged agreement, and the courts require strict proof of fairness when called upon to enforce it against the prospective wife; "and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement."

Pierce v *Pierce*, 71 N. Y. 154, 157, 158;
Graham v. *Graham*, 143 N. Y. 573, 577, 580;
Perkins v. *Guaranty Trust Co.*, 274 N. Y. 250, 263, 269;
Lamb v. *Lamb*, 18 App. Div. (N. Y.) 250, 257.

The cases in other jurisdictions are to the same effect:

Juhasz v. *Juhasz*, 134 Ohio State 257 (16 N. E. (2d) 328);
Denison v. *Dawes*, 121 Me. 402 (117 Atl. 314) (citing the *Pierce* and *Graham* cases);
Jones v. *McGonigle*, 327 Mo. 457 (37 S. W. (2d) 892);
Carr v. *Lackland*, 20 S. W. 624 (Missouri) (citing the *Pierce* case);
Stahl v. *Stahl*, 115 Neb. 882 (215 N. W. 131) (citing the *Pierce* case);
DeBolt v. *Blackburn*, 328 Ill. 420 (159 N. E. 790);
Brown v. *Brown*, 329 Ill. 198 (160 N. E. 149);
Taylor v. *Taylor*, 144 Ill. 436 (33 N. E. 532) (citing the *Pierce* case);
Peyton v. *William C. Peyton Corp.*, 123 Atl. 1482 (Delaware);
Merchants' National Bank of Mobile v. *Hubbard*, 222 Ala. 518.

We respectfully submit that the instrument in question shows on its face evidence of lack of consideration, inequality, overreaching and unfairness, particularly when consid-

ration is given to the quantum of the estate left by the husband, namely, $236,852.72. That in itself is the affirmative proof of inequality and overreaching on the part of the prospective husband, if such affirmative proof were necessary, and is the "vitiating element, even though slight" which subjects the document to "searching scrutiny." As stated by the learned Surrogate:

> "Here the prospective wife, on the eve of her marriage, was induced to sign a document, not prepared by her, knowledge of the nature, terms and effect of which she denies, the effect of which is to deprive her, utterly without any intimation or semblance of consideration, of rights of inheritance worth $116,426.37. If this demonstration is not a *prima facie* sufficient indication of inequality and overreaching on the part of the prospective husband to require his estate to come forward with some explanation demonstrating that no advantage was taken by him of the relationship which the Court of Appeals has on at least two occasions held to be one of confidence and justified reliance (*Pierce* v. *Pierce*, 71 N. Y. 154, 158; *Graham* v. *Graham*, 143 N. Y. 573, 580), it would seem that the effect of subsection 9 of section 18 of the Decedent Estate Law, as interpreted, has made it possible for a designing spouse or prospective spouse to nullify the entire beneficent purpose of the enactment with virtual impunity" (R., 32).

It was not necessary that the surviving spouse should affirmatively prove any overreaching or deception on the part of her deceased husband in obtaining the execution of the instrument in question by her, as they were under the confidential relationship of prospective husband and prospective wife. The cases in which such a relationship exists form an exception to the rule in ordinary cases that overreaching and deception must be proven by the party making such claim. In *Boyd* v. *De La Montagnie*, 73 N. Y. 498, which was an action by the executors of the deceased wife to set aside a gratuitous transfer of property made by her to her husband, the Court stated at page 502:

"It is not found that the defendant acted with a fraudulent intent in procuring the transfer, but I do not understand that this is necessary to be affirmatively shown in this class of cases. A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband occupies such a relation to the wife, and the equitable principles referred to would apply to them in respect to gratuitous transfers by the wife to the husband, however it might be in ordinary business transactions, which the wife may legally engage in. When this relation exists the person obtaining the benefit must show by the clearest evidence, that the gift was freely and deliberately made. The burden is upon the person taking the gift to show that the transaction was fair and proper (citing cases)."

See, also:

Pomeroy, Equity Jurisprudence (4th Ed.) sections 955-957, 963.

Furthermore, the petitioners assumed and took the initiative in seeking a determination of the validity of the right of election exercised by the widow, and the burden of proof thus rested upon them to establish that the decedent's widow had waived her right to so elect.

Matter of Rechtschaffen, 278 N. Y. 336, 338;
Matter of Maiden, 284 N. Y. 429, 431;
Matter of Green, 155 Misc. (N. Y.) 641, 649; aff'd. 246 App. Div. 583.

The petition herein alleges (R., 10, 11) that the instrument in question was made "in contemplation and in consideration of marriage," and "for other good and valuable consideration"; and that "said Helena Day Snyder had full knowledge of the nature, terms, and effect thereof," at the time of its execution and delivery. Petitioners gave no evidence as to such allegations, which were denied by the answer (R., 17).

The appellants have made a point that the widow did not testify in her own behalf as to the making of the instrument and the negotiations leading to its execution. She was incompetent to so testify, in the absence of any evidence by the appellants as to the personal transaction involved in the instrument (N. Y. Civil Practice Act, sec. 347).

CONCLUSION.

We respectfully submit that the appeal should be dismissed for lack of jurisdiction in this court; or that the judgment of the Surrogate's Court entered on the remittitur from the Court of Appeals should be affirmed.

Respectfully submitted,

ANDREW F. VAN THUN, JR.,
Attorney for Appellee,
Chase L. Day, executor, etc.

Andrew F. Van Thun, Jr.,
George H. Burtis,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 51.—October Term, 1941.

Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased, et al., Appellants, *vs.* Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased.	Appeal from the Surrogate's Court, Kings County, State of New York.

[January 5, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

The federal question presented upon this appeal is whether § 18 of the New York Decedent Estate Law works an impairment of the obligation of contract, forbidden by Article I, Section 10 of the Constitution, or a deprivation of property without due process, forbidden by the Fourteenth Amendment.

The instrument which appellants claim embodies a contract which has been impaired, and under which they claim property rights, reads as follows:

"I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized."

Appellee's decedent, Helena Day Snyder, who died in the course of this litigation, executed this instrument in London two days before her marriage to John J. McGlone, appellants' decedent.

The laws of New York at the time gave to a widow dower rights in her husband's real estate, but, except for restrictions on charitable gifts not involved here, left him otherwise free to make testamentary disposition of all his property to strangers.

On August 21, 1930, McGlone executed a will, one clause of which recited Helena's waiver but "nevertheless" made a bequest of $2,000 to her as a "slight token" of his affection and admiration. The legislation complained of, giving a testator's surviving spouse a right of election to take against the will, had been enacted as § 18 of the Decedent Estate Law on March 29, 1929, but it could not become effective until September 1, 1930, a few days after McGlone executed his will.[1] It permitted waiver by a spouse or prospective spouse of the protection thus afforded, but in order to be effective the waiver was required to be "by an instrument subscribed and duly acknowledged."[2] The instrument signed by Helena was not acknowledged, and the new legislation was limited in operation to wills executed after its effective date.

McGlone so acted as to bring his estate under this new legislation. On July 6, 1934, he executed a codicil to his will which, although it did not disturb the provision made for his wife in his earlier will, had the effect of bringing the entire will, modified and re-

[1] Section 18-1 of the Decedent Estate Law, enacted by N. Y. Laws of 1929, c. 229, § 4, provided:

"Where a testator dies after August thirty-first, nineteen hundred and thirty, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section."

Section 18-1(f) provided:

"Where the aggregate of the provisions under the will for the benefit of the surviving spouse including the principal of a trust, or a legacy or devise, or any other form of testamentary provision, is less than the intestate share, the surviving spouse shall have the limited right to elect to take the difference between such aggregate and the amount of the intestate share, and the terms of the will shall otherwise remain effective."

[2] Section 18-9 read as follows:

"The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement of settlement so executed, made before or after marriage."

In the following year the words "of settlement" were deleted from this provision, and the following sentence was added: "An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section." N. Y. Laws of 1930, c. 174, § 1.

published, within the provisions of the new law[3] and thus, according to the terms of § 18, of giving her a right of election to take under the statute and against the will.

Helena sought to exercise this right, and thus precipitated the present litigation, in which the quoted instrument was pleaded as a bar to the right. The Surrogate held that the instrument was not a contract; the Appellate Division held that it was; and the New York Court of Appeals assumed, without deciding, that apart from the effect of § 18 of the Decedent Estate Law, it was a binding contract, validly executed, and entitled to the protection of the Constitutional provisions here invoked. The Court of Appeals held, however, that "A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver." Section 18 was held to confer a right of election upon Helena, and to be consistent with the requirements of the contract and due process clauses of the Federal Constitution. *Matter of McGlone*, 284 N. Y. 527; 533.

The reluctance of the New York Court of Appeals to decide the question whether the instrument in question did constitute a contract is quite understandable upon consideration of the record made up in this case. It appears from the face of the instrument that it was penned on stationery of the Savoi Hotel, London, by an unidentified scribe, and that the only signature was Helena's. The instrument does not recite mutuality of agreement. It recites no consideration, and none is proved. It rather negatives the receipt of consideration and the likelihood that marriage was such by indicating that the parties had already exchanged promises to marry. Nor is there anything in text or context to help identify the source of the rights said to be waived. No circumstances are adduced to show that either of the parties, about to marry in a foreign land, then had New York as a domicile or was contracting with reference to its laws, either present or future. The marriage record in evidence shows that his "residence at the time of marriage" was "Savoy Hotel, London" and hers was "The Beverleys, Thornbury Road, Isleworth." If either was domiciled elsewhere, there is nothing to indicate it. There is not even any showing that at the time either of the parties owned or had any expectation of owning

[3] Decedent Estate Laws, § 2.

property in New York. No apparent heed has been given to the usual rule that the law of the place of contracting determines questions of form, capacity to contract, necessity of consideration, and some aspects of the duty of performance. Both sides seem to have assumed, but for reasons that are not revealed, that the law of New York governs these questions. The niggardliness of the record may be due in some part to the restriction imposed on the right of a survivor to testify by § 347 of the New York Civil Practice Act, but this does not warrant an ill-informed guess by this Court as to the existence of a contract or its meaning under properly applicable rules of law.

When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court. *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Railroad Commission* v. *Eastern Texas R. R.*, 264 U. S. 79, 86-87; *Coolidge* v. *Long*, 282 U. S. 582, 597; *U. S. Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236; *Higginbotham* v. *Baton Rouge*, 306 U. S. 535, 538. In any view we might take of the constitutional questions urged here we should not regard this record as an adequate basis for invalidating a state statute. But, lest a decision on this ground be taken as an invitation to further litigation in the New York courts and in this Court, we shall emulate the generosity shown by the Court of Appeals to the appellants and adopt its assumption as to the existence and nature of the contract for the purpose of disposing of the other questions urged.

Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. *Mager* v. *Grima*, 8 How. 490; *United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; cf. *Randall* v. *Kreiger*, 23 Wall. 137, 148. Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person. Appellants cannot successfully attack the constitutionality of the new legis-

lation which went into effect before McGlone's death, and became operative only as the result of his own voluntary act.

McGlone was free to consent to a cancellation or revocation of Helena's waiver, or to make a valid bequest to her of all or any of his property despite it. Further, he could free her of the restraints of her waiver by voluntarily committing an act to which the applicable law attached that consequence. This is what he did by executing the codicil of July 6, 1934, voluntarily taking advantage of the privilege of further testamentary disposition offered by the laws of New York. So long as McGlone stood on the will made before the effective date of the legislation, the law allowed him to avail himself of the full force and effect of the waiver. Given his choice between adhering to any will made before September 1, 1930, or of bringing his estate under the new law, McGlone saw fit to execute a further testamentary document after that date and thus to bring the new legislation into operation as to himself, his estate and survivors. For the purpose of considering the application of the contract and due process clauses of the Federal Constitution, the case is as if he had made a voluntary legacy to his wife despite her waiver. If the obligation of the waiver suffered impairment, it was only because he exercised further testamentary privileges with a condition attached, and thereby brought those consequences unwittingly or intentionally upon himself and his estate.

The condition clearly was such as New York might without restraint from the Federal Constitution annex to the privilege of making a will under its law. Its effect was to continue as obligations of his estate social responsibilities which he had assumed during life,[4] unless they had been waived with required formality. The State could have conditioned any further exercise of testamentary power upon giving a right of election to the surviving spouse regardless of any waiver, however formally executed; and having

[4] The Court of Appeals has said of this legislation:

"After September 1, 1930, the absence of protection to the widow under prior laws gave way to the widow's right of election to take a specific part of the estate against the will. The inconsistency in our old law which compelled a man to support his wife during his lifetime and permitted him to cut her off with a dollar at his death, has given way to a new public policy which no longer permits a testator to dispose of his property as he pleases." Matter of Greenberg, 261 N. Y. 474, 478.

When it enacted § 18 of the Decedent Estate Law, New York at the same time abolished for the future the ancient estates and rights of dower and curtsey, and made important changes in the rules as to descent and distribution of property.

recognized the binding effect of a waiver, it could condition that recognition upon acknowledgment, which was no doubt considered a desirable safeguard against casual, informal, or ill-considered abandonment of statutory protection, as well as against overreaching or fraud.

Affirmed.

Mr. Justice ROBERTS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.